71 Am. Jur. 2d State and Local Taxation § 118

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State and Local Taxation
John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Alan J. Jacobs, J.D., Sonja Larsen, J.D., Jack K. Levin, J.D., Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc., Jeffrey J. Shampo, J.D., and Eric C. Surette, J.D.

Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

A. In General

§ 118. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2101, 2166 to 2168, 2170, 2212, 2214

Taxation is the rule and not the exception,[1] and all property in a state is subject to taxation unless expressly exempted by statute[2] or unless the legislative power of the State to provide for the levy and collection of taxes is restricted by the state and federal constitutions.[3] The receipt of direct or specific benefits is not a condition precedent to the payment of taxes which are not an assessment for benefits.[4]

Observation:

The purpose of a legislative decree that all property, real and personal, within the jurisdiction of the State is subject to taxation where owned by a resident or nonresident is to treat all property owners equally so that the tax burden will be shared proportionately and to gather all the tax money to which the various counties and municipalities are entitled.[5]

A state in which real property is located may tax it regardless of the citizenship of the owner.[6] However, a State may not unjustifiably discriminate between residents and nonresidents in the exercise of its taxing power.[7]

Personalty is taxable at the domicile of the owner,[8] regardless of its actual location in that state on the assessment date,[9] unless the tangible personal property has acquired a tax situs of its own away from the domicile.[10] However, if, on the date for assessment, tangible personal property has acquired a situs in a nondomiciliary state, it is subject to a nondiscriminatory property tax in such state;[11] taxable tangible personal property must have acquired a tax situs in the state, for situs is an

absolute essential for tax exaction.[12] Personal property can have more than one situs for tax purposes.[13] As a matter of due process, a domiciliary state cannot tax tangible personal property which is permanently located outside of the state.[14]

Observation:

The situs of personal property for purposes of taxation is determined by the legislature, and the legislature may provide different rules for different kinds of property and may change the rules from time to time.[15]

The general theory of taxation of intangibles is that they are taxed at the residence of the owner (mobilia sequuntur personam)[16] regardless of the actual location.[17] However, intangibles can be taxed by states other than the domicile of the owner where there have been sufficient contacts with the jurisdiction to make it fair and reasonable that the tax be paid,[18] such as if it is controlled and placed with some degree of permanency in another state.[19]

Footnotes

1 In re Inter-Faith Villa, L.P., 39 Kan. App. 2d 810, 185 P.3d 295 (2008) (abrogated on other grounds by, In re Mental Health Ass'n of Heartland, 289 Kan. 1209, 221 P.3d 580 (2009)).

2 Provena Covenant Medical Center v. Department of Revenue, 236 Ill. 2d 368, 339 Ill. Dec. 10, 925 N.E.2d 1131 (2010); In re Inter-Faith Villa, L.P., 39 Kan. App. 2d 810, 185 P.3d 295 (2008) (abrogated on other grounds by, In re Mental Health Ass'n of Heartland, 289 Kan. 1209, 221 P.3d 580 (2009)); Grand Forks Homes, Inc. v. Grand Forks Bd. of County Com'rs, 2011 ND 50, 795 N.W.2d 381 (N.D. 2011).
As to exemptions, see §§ 207 et seq.
All non-exempt property is taxed ad valorem unless the legislature provides otherwise through the enactment of a substitute tax. Liddell v. Heavner, 2008 OK 6, 180 P.3d 1191 (Okla. 2008).

3 Chicago Gravel Co. v. Rosewell, 103 Ill. 2d 433, 83 Ill. Dec. 164, 469 N.E.2d 1098 (1984).

4 Greater Chillicothe Sanitary Dist. of Peoria County v. Prather, 157 Ill. App. 3d 1086, 109 Ill. Dec. 760, 510 N.E.2d 628 (3d Dist. 1987); Griffin v. Anne Arundel County, 25 Md. App. 115, 333 A.2d 612 (1975).
As to taxation of unbenefited real property, see § 129.

5 Appeal of Plushbottom and Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505 (1981).

6 Hough v. Director, Division of Taxation, 2 N.J. Tax 67, 1980 WL 356759 (1980), decision aff'd, 4 N.J. Tax 528, 1981 WL 404491 (Super. Ct. App. Div. 1981).
As to taxability of real property, see §§ 127 et seq.

7 Rubin v. Glaser, 83 N.J. 299, 416 A.2d 382 (1980).

8 Indiana Dept. of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264 (Ind. 1994); Johnson v. Otey, 299 S.W.3d 308 (Mo. Ct. App. S.D. 2009).
As to taxability of personalty, generally, see § 123.
As to place of tax of personal property, generally, see §§ 547 et seq.

9 Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So. 2d 884, 2 A.L.R.4th 421 (Fla. Dist. Ct. App. 2d Dist. 1979); Vector Co., Inc. v. Benson, 491 S.W.2d 612 (Tenn. 1973).

10 Indiana Dept. of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264 (Ind. 1994); Appraisal Review Bd. of

Galveston County, Tex. v. Tex-Air Helicopters, Inc., 970 S.W.2d 530 (Tex. 1998).

11 Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So. 2d 884, 2 A.L.R.4th 421 (Fla. Dist. Ct. App. 2d Dist. 1979).

12 National Gypsum Co. v. Department of Treasury, 128 Mich. App. 750, 341 N.W.2d 203 (1983); Appeal of Bassett Furniture Industries, Inc., 79 N.C. App. 258, 339 S.E.2d 16 (1986).

13 Aramco Associated Co. v. Harris County Appraisal Dist., 33 S.W.3d 361 (Tex. App. Texarkana 2000); Mesa Leasing Ltd. v. City of Burlington, 169 Vt. 93, 730 A.2d 1102 (1999).
"Allocating" is determining the ratio of usage of personal property within each taxable situs when the property has more than one taxable situs. Starflight 50, L.L.C. v. Harris County Appraisal Dist., 287 S.W.3d 741 (Tex. App. Houston 1st Dist. 2009).
Instrumentalities of interstate commerce, such as airplanes, trains, and inland water vessels, may acquire a tax situs in multiple states. Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 (2011).

14 Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So. 2d 884, 2 A.L.R.4th 421 (Fla. Dist. Ct. App. 2d Dist. 1979); Marion v. Floyd County Bd. of Equalization, 270 Ga. 475, 511 S.E.2d 512 (1999); State v. Richard L. Hodges, Inc., 420 A.2d 247 (Me. 1980).

15 In re Appeal of SAS Institute Inc. from a decision of Wake County Bd. of Com'rs for 2006, 200 N.C. App. 238, 684 S.E.2d 444 (2009).

16 Matter of McCormac, 64 Haw. 258, 640 P.2d 282 (1982); Goodyear Tire & Rubber Co. v. Tracy, 85 Ohio St. 3d 615, 1999-Ohio-325, 710 N.E.2d 686 (1999).
As to taxation of intangible personal property, see § 124.

17 Fleet Nat. Bank v. Clark, 714 A.2d 1172 (R.I. 1998).

18 Matter of Heftel Broadcasting Honolulu, Inc., 57 Haw. 175, 554 P.2d 242 (1976).

19 Matter of McCormac, 64 Haw. 258, 640 P.2d 282 (1982); Indiana Dept. of State Revenue v. Mercantile Mortg. Co., 412 N.E.2d 1252 (Ind. Ct. App. 1980).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

A. In General

§ 119. Necessity of legislative determination of subjects

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2166 to 2168

Everything of value is not necessarily subject to taxation unless the legislature makes it so.[1] The obligation to pay taxes is purely statutory,[2] and taxes can only be levied, assessed, and collected in the method provided by an express statute.[3] Thus, nothing is taxable unless clearly within the grant of power to tax.[4]

Where there is a reasonable doubt as to the meaning of a taxing act, it will be construed most favorably to the taxpayer.[5] However, tax laws must be applied to the facts as they exist, not as they might exist or as the taxpayer intended them to exist.[6]

Practice Tip:
Although the plain terms of a statute may not be contradicted by an administrative interpretation thereof, the practical construction by a tax commissioner of an ambiguous statute is entitled to some weight in construing the statute.[7]

There is a presumption that the scope of a tax must be definite and cannot be extended[8] by implication or forced construction.[9]

Tax legislation should be implemented in a manner that gives effect to the economic substance of the transaction.[10] If a transaction comes within a form which a statute has made taxable, it is no answer to say that it is indistinguishable in

substance from the transaction in a different form.[11] A taxing authority may not be required to acquiesce in a taxpayer's election of form for doing business but rather may look to the reality of the tax event and sustain or disregard the effect of the fiction in order to best serve the purposes of the tax statute.[12]

Where a State imposes an unconstitutional tax that is not beyond the power of the legislature to impose or does not fall on persons immune from taxation, the state legislature may modify the offending statute retroactively to correct the constitutional defect.[13] Additionally, a State may change its position on the applicability of taxes even without a change in the tax statute.[14]

Footnotes

1 First Main Street Corp. v. Board of Assessors of Acton, 49 Mass. App. Ct. 25, 725 N.E.2d 1076 (2000).

2 City of Boise v. Ada County, 147 Idaho 794, 215 P.3d 514 (2009).

3 Chicago Gravel Co. v. Rosewell, 103 Ill. 2d 433, 83 Ill. Dec. 164, 469 N.E.2d 1098 (1984); Newport Gas Light Co. v. Norberg, 114 R.I. 696, 338 A.2d 536 (1975); Wharf Resources (USA) Inc. v. Farrier, 1996 SD 110, 552 N.W.2d 610 (S.D. 1996).

4 Board of County Com'rs of Leavenworth County v. McGraw Fertilizer Service, Inc., 261 Kan. 901, 933 P.2d 698 (1997), opinion modified on other grounds on reh'g, 261 Kan. 1082, 941 P.2d 1388 (1997).

5 In re United Teleservices, Inc., 267 Kan. 570, 983 P.2d 250 (1999); Jones v. Department of Revenue, 5 Or. Tax 698, 1974 WL 1330 (1974).

6 Black United Fund of New Jersey, Inc. v. East Orange City (Orange County), 17 N.J. Tax 446, 1998 WL 531696 (1998), aff'd, 339 N.J. Super. 462, 772 A.2d 65 (App. Div. 2001), also published at, 19 N.J. Tax 480, 2001 WL 589940 (Super. Ct. App. Div. 2001) and aff'd, 19 N.J. Tax 480, 2001 WL 589940 (Super. Ct. App. Div. 2001).

7 Ladish Malting Co. v. Stutsman County By and Through Stutsman County Bd. of Com'rs, 351 N.W.2d 712 (N.D. 1984).

8 Dennis Development Co., Inc. v. Department of Revenue, 122 Ariz. 465, 595 P.2d 1010 (Ct. App. Div. 1 1979); Joy Management Co. v. City of Detroit, 176 Mich. App. 722, 440 N.W.2d 654 (1989).

9 Joy Management Co. v. City of Detroit, 176 Mich. App. 722, 440 N.W.2d 654 (1989).

10 Guttmann Picture Frame Associates v. O'Cleireacain, 209 A.D.2d 340, 618 N.Y.S.2d 781 (1st Dep't 1994).

11 Transervice Lease Corp. v. Tax Appeals Tribunal of State of N.Y., 214 A.D.2d 775, 624 N.Y.S.2d 661 (3d Dep't 1995).

12 Guttmann Picture Frame Associates v. O'Cleireacain, 209 A.D.2d 340, 618 N.Y.S.2d 781 (1st Dep't 1994).

13 W.R. Grace & Co.—Conn. v. State, Dept. of Revenue, 137 Wash. 2d 580, 973 P.2d 1011 (1999).

14 Roxborough Manayunk Federal Sav. and Loan Ass'n v. Com., 687 A.2d 1202 (Pa. Commw. Ct. 1997).

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71 Am. Jur. 2d State and Local Taxation § 120

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

A. In General

§ 120. Manufacture and manufacturing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2171, 2174, 2176

A.L.R. Library

What constitutes manufacturing and who is a manufacturer under tax laws, 17 A.L.R.3d 7

A taxpayer that is classified as a manufacturer with respect to one branch of its business can also be classified as conducting a sales business with respect to a different branch, and thus, equipment used in the latter branch, but not the former, is subject to taxation as personal property used in a sales business.[1] The business of manufacturing an article is essentially different from that of selling the article after it has been manufactured for purposes of classifying the equipment used in those respective functions for tax purposes; thus, the fact that the article is manufactured for sale cannot have the effect of obliterating the line of demarcation between the two businesses.[2]

The legislature has the power to make any kind of property realty for purposes of taxation,[3] and manufacturing machinery may be deemed real estate, or regarded as such, in its assessment and taxation.[4] Electric generators have been held to be "real property."[5]

Footnotes

1 Coca-Cola Bottling Co. of Roanoke, Inc. v. County of Botetourt, 259 Va. 559, 526 S.E.2d 746 (2000).

[2] Coca-Cola Bottling Co. of Roanoke, Inc. v. County of Botetourt, 259 Va. 559, 526 S.E.2d 746 (2000).

[3] Opinion of the Justices, 142 N.H. 102, 697 A.2d 125 (1997).
As to taxability of real estate and interests therein, see §§ 127 et seq.

[4] Beeler v. Boylan, 106 Ill. App. 3d 667, 62 Ill. Dec. 385, 435 N.E.2d 1357 (4th Dist. 1982); Opinion of the Justices, 142 N.H. 102, 697 A.2d 125 (1997); Weyerhaeuser Co. v. Town of Hancock, 151 Vt. 279, 559 A.2d 158 (1989).

[5] Boston Edison Co. v. Board of Assessors of Boston, 402 Mass. 1, 520 N.E.2d 483 (1988); KIAC Partners v. Cerullo, 260 A.D.2d 381, 687 N.Y.S.2d 692 (2d Dep't 1999).

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Part Three. Subjects of Taxation

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B. Specific Subjects and Persons Taxable

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Taxation 2101, 2166, 2170 to 2190, 2196, 2199, 2315

A.L.R. Library

A.L.R. Index, Excise Taxes
A.L.R. Index, Income Tax
A.L.R. Index, Nonprofit Organizations
A.L.R. Index, Personal Property Tax
A.L.R. Index, Taxes
A.L.R. Index, Taxpayers
West's A.L.R. Digest, Taxation 2101, 2166, 2170 to 2190, 2196, 2199, 2315

Trial Strategy

Taxation of Litigation Recoveries, 47 Am. Jur. Trials 591

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B. Specific Subjects and Persons Taxable

1. In General

§ 121. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2166, 2170

In some jurisdictions, property taxes are levied on property rather than ownership; property is the subject of taxation, and its owner is a conduit for the exaction.[1] In other jurisdictions, it is held that the property itself does not accrue an ad valorem tax obligation; the only purpose served by the property itself in the scheme of ad valorem taxation is that the property's value forms the basis for the assessment, and the property stands as security for the collection of taxes not paid by the owner.[2] In other words, the legal incidence of a tax falls upon the person or entity who has the legal obligation to pay the tax,[3] and with limited exceptions, a local property tax is charged to and collected from the owner of the property.[4] Especially in tax law, the key elements of ownership are control and the right to enjoy the benefits of the property.[5] Four factors that are relevant to whether a taxable possessory interest exists in property are exclusivity, independence, durability, and private benefit.[6] Revenue collection is not concerned with the "refinements of title" but instead is concerned with the realities of ownership.[7] Even though a general assessment statute provides that all personal property is only assessable to the owner of the property, a more specific statute may permit the State to assess a property tax against a nonowner that controls, operates, or manages property.[8]

Subjecting one party with an interest in the property to liability for taxes incurred by another party with an interest in the property is not inherently improper.[9] Where legal title is retained for security purposes only, and another person has beneficial or equitable ownership, the obligation is that of the beneficial or equitable owner.[10]

Although a purchaser does not become personally liable for the delinquent taxes assessed against property before the purchaser acquired it, the property may be subject to a lien.[11]

Footnotes

1 Henshaw v. State Tax Com'n, 126 Mich. App. 806, 338 N.W.2d 224 (1983).

2 City of Charlotte v. Little-McMahan Properties, Inc., 52 N.C. App. 464, 279 S.E.2d 104 (1981).

3 Canteen Service, Inc. v. State, 83 Wash. 2d 761, 522 P.2d 847 (1974).

4 City of Anaheim v. County of San Diego, 190 Cal. App. 3d 695, 235 Cal. Rptr. 572 (4th Dist. 1987); Rainhold Holding Co. v. Freehold Tp., 14 N.J. Tax 266, 1994 WL 647964 (1994), order aff'd, 15 N.J. Tax 675, 1995 WL 870969 (Super. Ct. App. Div. 1995); Burlington Northern Inc. v. Dept. of Revenue, 8 Or. Tax 19, 1979 WL 1811 (1979), modified on other grounds, 291 Or. 729, 635 P.2d 347 (1981).

5 Kankakee County Bd. of Review v. Property Tax Appeal Bd., 316 Ill. App. 3d 148, 249 Ill. Dec. 186, 735 N.E.2d 1011 (3d Dist. 2000).

6 U.S. v. County of San Diego, 53 F.3d 965 (9th Cir. 1995).

7 Kankakee County Bd. of Review v. Property Tax Appeal Bd., 316 Ill. App. 3d 148, 249 Ill. Dec. 186, 735 N.E.2d 1011 (3d Dist. 2000).

8 Flight Options, LLC v. State, Dept. of Revenue, 172 Wash. 2d 487, 259 P.3d 234 (2011).

9 Mathis v. Liquor Bd., 146 Ariz. 570, 707 P.2d 974 (Ct. App. Div. 1 1985).

10 City of Anaheim v. County of San Diego, 190 Cal. App. 3d 695, 235 Cal. Rptr. 572 (4th Dist. 1987).

11 Franz v. Katy Independent School Dist., 35 S.W.3d 749 (Tex. App. Houston 1st Dist. 2000).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

1. In General

§ 122. What constitutes property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170 to 2185

A statutory definition of "property" controls the classification of the property for tax purposes.[1] Classification of property as realty or personalty for tax purposes may differ from classification for other purposes.[2] However, the legislature does not have unbounded power to determine when property shall be considered realty or personalty for taxation purposes.[3]

Footnotes

1 Morse Signal Devices v. County of Los Angeles, 161 Cal. App. 3d 570, 207 Cal. Rptr. 742 (2d Dist. 1984).

2 Bostian v. Franklin State Bank, 1 N.J. Tax 270, 1980 WL 356730 (1980), order aff'd, 179 N.J. Super. 174, 430 A.2d 1140 (App. Div. 1980).

3 General Motors Corp. v. City of Linden, 150 N.J. 522, 696 A.2d 683 (1997).

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IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

1. In General

§ 123. What constitutes property—Personal property, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2176

A.L.R. Library

Validity, construction, and application of state laws imposing tax or license fee on possession, sale, or the like, of illegal narcotics, 12 A.L.R.5th 89

In some states, all nonexempt tangible personal property located in the state is subject to ad valorem taxation.[1] In other states, tangible personal property used to produce income is subject to tax,[2] or, stated alternatively, taxable personal property includes all nonexempt personal property located and used in business in the state.[3] In one state, unless by reason of the taxation statute a "property" is defined as real property, it is deemed personal property.[4]

"Tangible property," for tax purposes, has a physical aspect and has value in and of itself.[5]

The owner or possessor of tangible personal property will be looked to for payment of the personal property tax.[6] However, the mere use of personal property subject to taxation in the operation of a business for profit is not enough to establish that the user has a beneficial interest in the property so as to make the user a "taxpayer" within a statute defining a "taxpayer" to include an owner having a beneficial interest in taxable personal property.[7]

Footnotes

1 Northwest Airlines, Inc. v. Tennessee State Bd. of Equalization, 11 F.3d 70 (6th Cir. 1993); D. C. Speer Const. Co. v. Arizona Dept. of Transp., 124 Ariz. 208, 603 P.2d 100 (Ct. App. Div. 1 1979); Northeast Datacom, Inc. v. City of Wallingford, 212 Conn. 639, 563 A.2d 688 (1989) (municipal taxation).

2 Rogers v. State Bd. of Tax Com'rs, 565 N.E.2d 398 (Ind. Tax Ct. 1991); Bylund v. Department of Revenue, 7 Or. Tax 502, 1978 WL 1551 (1978).

3 Schenley Affiliated Brands Corp. v. Limbach, 45 Ohio St. 3d 90, 543 N.E.2d 1177, 10 U.C.C. Rep. Serv. 2d 1220 (1989).
As to exemptions, see §§ 207 et seq.

4 Frontier Telephone of Rochester v. City of Rochester Assessor, 16 Misc. 3d 471, 842 N.Y.S.2d 188 (Sup 2007).

5 Salt Lake City Southern R. Co., Inc. v. Utah State Tax Com'n, 1999 UT 90, 987 P.2d 594, 90 A.L.R.5th 789 (Utah 1999).

6 W.H. Paige & Co. v. State Bd. of Tax Com'rs, 711 N.E.2d 552, 40 U.C.C. Rep. Serv. 2d 632 (Ind. Tax Ct. 1999).

7 Refreshment Service Co., Inc. v. Lindley, 67 Ohio St. 2d 400, 21 Ohio Op. 3d 251, 423 N.E.2d 1119 (1981).

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IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

1. In General

§ 124. What constitutes property—Intangible property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2101, 2176

In some jurisdictions, a grant of power to tax property does not limit the power to actual tangible property,[1] and there is no constitutional prohibition against the taxation of personal rights.[2] To be taxed under an intangible tax statute, the taxpayer must either own or control the intangible.[3] However, other jurisdictions hold that an intangible asset is not a proper subject to be taxed under the state's property tax laws.[4] It may be that the power to collect ad valorem taxes on intangible personal property is denied local authorities and reserved only to the state.[5]

"Intangible personal property," for tax purposes, is property which is not itself intrinsically valuable but which derives its chief value from that which it represents.[6] The critical factor in distinguishing between tangible and intangible personal property, for the purposes of a municipal property tax, is whether the taxpayer owns the individual's skills or the tangible end product of those skills.[7]

An "intangibles tax" is a specific tax on the privilege of ownership of intangible personal property, and the fact that income is used as a partial basis for measuring an intangibles tax does not make it an income tax.[8] An intangibles tax is a specific tax against the ownership of intangible property, whereas an income tax is an assessment upon the income of a person and not upon any particular property from which that income is derived, and thus, the imposition of both an income tax and an intangibles tax is not improper double taxation.[9]

Footnotes

1 Superior Bath House Co. v. McCarroll, 312 U.S. 176, 61 S. Ct. 503, 85 L. Ed. 721 (1941).

[2] Berry v. Costello, 62 Ill. 2d 342, 341 N.E.2d 709 (1976).

[3] Meridian Mortg. Co., Inc. v. State, 182 Ind. App. 328, 395 N.E.2d 433 (1979).

[4] Western Title Guaranty Co. v. County of Stanislaus, 41 Cal. App. 3d 733, 116 Cal. Rptr. 351 (5th Dist. 1974); Pinelake Housing Co-op. v. City of Ann Arbor, 159 Mich. App. 208, 406 N.W.2d 832 (1987); Gregg County Appraisal Dist. v. Laidlaw Waste Systems, Inc., 907 S.W.2d 12 (Tex. App. Tyler 1995), writ denied, (Dec. 22, 1995).

[5] Nikolits v. Verizon Wireless Personal Communications L.P., 9 So. 3d 690 (Fla. Dist. Ct. App. 4th Dist. 2009).

[6] Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448 (Fla. 1993).
As to taxation of credits and contractual rights and judgments, see §§ 135 et seq.

[7] Reynaud v. Town of Winchester, 35 Conn. App. 269, 644 A.2d 976 (1994).

[8] Davis v. Department of Treasury, 124 Mich. App. 222, 333 N.W.2d 521 (1983).
As to income tax, generally, see § 358.

[9] Davis v. Department of Treasury, 124 Mich. App. 222, 333 N.W.2d 521 (1983).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

1. In General

§ 125. What constitutes property—Franchises and privileges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2176

Franchises are very valuable and productive property and, when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.[1]

A cable television franchisee's right to use and occupy public rights-of-way constitutes a "taxable possessory interest" for ad valorem tax purposes.[2] However, a cable television franchisee's right to engage in the cable television business by charging a fee and making a profit is not an assessable real property possessory interest; such a right constitutes an intangible asset which is exempt from tax under the state constitution.[3]

Footnotes

1. Branson v. Bush, 251 U.S. 182, 40 S. Ct. 113, 64 L. Ed. 215 (1919); City of Baltimore v. Johnston, 96 Md. 737, 54 A. 646 (1903); Adams v. Samuel R. Bullock & Co., 94 Miss. 27, 47 So. 527 (1908).

2. County of Stanislaus v. Assessment Appeals Bd., 213 Cal. App. 3d 1445, 262 Cal. Rptr. 439 (5th Dist. 1989).

3. County of Stanislaus v. Assessment Appeals Bd., 213 Cal. App. 3d 1445, 262 Cal. Rptr. 439 (5th Dist. 1989).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

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1. In General

§ 126. Property owned by another municipality or devoted to public use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2171, 2315

With respect to the taxation by a municipal corporation of the property of another municipal corporation of the same state located within the boundaries of the former, it is the majority rule that such property is exempt from such taxation, if it would be exempt if located within its own territorial boundaries, in the absence of any provision to the contrary; in many instances, the exemption from taxation is expressed by constitutional provision or by statute.[1]

Footnotes

1 City of Sarasota v. Mikos, 374 So. 2d 458 (Fla. 1979) (vacant land); Collector of Taxes of Milton v. City of Boston, 278 Mass. 274, 180 N.E. 116, 81 A.L.R. 1515 (1932) (land, railway station, and track); Traverse City v. Blair Tp., 190 Mich. 313, 157 N.W. 81 (1916) (electric power plant); Anoka County v. City of St. Paul, 194 Minn. 554, 261 N.W. 588, 99 A.L.R. 1137 (1935) (waterworks); State v. Houston Lighting & Power Co., 609 S.W.2d 263 (Tex. Civ. App. Corpus Christi 1980), writ refused n.r.e. (nuclear power project).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

2. Real Estate and Interests Therein

§ 127. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170 to 2175, 2187

All interest in land must be valued for tax purposes,[1] and all property is generally subject to an ad valorem real estate tax unless expressly exempt.[2] Taxation of real property has been held constitutional under state constitutions,[3] and various specific taxes have been held valid[4] or invalid as against due process challenges.[5]

Observation:

A real property tax law, unlike a mere contract, binds the world,[6] and when an individual acquires real estate, he or she is presumed to know what the law provides with respect to the taxation of land.[7]

In some jurisdictions, real property taxes are assessed against the property, not the owner, and the owner of a parcel of land is not personally liable for payment of the property taxes associated with the parcel.[8] Such real estate taxes constitute an encumbrance on the property upon which they are assessed.[9] Because taxes on real property are assessed against the property, not against the owner, it does not matter who owns the property,[10] and the tax remains with the property, regardless of the owner, when the property is transferred.[11]

However, it has also been held that real property tax liability rests with the owner or owners of the real property at the time

that real property taxes are charged, accrued, or assessed, i.e., due and payable.[12] "Ownership" for property tax purposes signifies the collection of rights to use and enjoy property, including the right to transmit it to others.[13] Generally the "owner" of property, for purposes of ad valorem taxes, is the individual or entity holding legal title to the property or holding equitable right to obtain legal title.[14] It should be noted that because the term "owner" in the property tax context connotes the owner of the fee and all included interests, it cannot simultaneously mean a different holder of a lesser-included interest such as occupants.[15] It may be that the record owner, as listed in the land records, is the owner of real property for tax assessment purposes.[16]

It has also been held that title to real property is not the test of taxability,[17] but rather, the general rule is that the party in possession and receiving the use and income of the property is obligated to pay the taxes and assessments.[18] The control of property and the right to its benefits are more significant than legal title alone in determining liability for real estate taxes.[19] In order for a possessory tax to be valid, the right of possession in the property must be independent, durable, and exclusive of rights held by others in the property.[20]

One who enjoys a life tenancy in real property, regardless of the manner in which that tenancy was created, is by statute liable for the taxes on that property.[21]

CUMULATIVE SUPPLEMENT

Cases:

Property owner was not personally liable for delinquent property taxes for which county, and successor in interest for lender that paid delinquent taxes on behalf of prior owner, sought to enforce tax liens, where property owner did not own property on first day of either year for which county and successor held liens for delinquent loans, and property owner did not expressly agree to personally assume liability for delinquent taxes. Tex. Tax Code Ann. 32.07(a), 33.41(a), 42.09(b)(1). Fenlon v. Harris County, 569 S.W.3d 783 (Tex. App. Houston 1st Dist. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Sterling Management-Orchard Ridge Apartments v. State Bd. of Tax Com'rs, 730 N.E.2d 828 (Ind. Tax Ct. 2000); Schwam v. Cedar Grove Tp., 9 N.J. Tax 406, 1987 WL 40552 (1987), judgment aff'd, 228 N.J. Super. 522, 550 A.2d 502 (App. Div. 1988).

2 Sullivan v. Pender County, 196 N.C. App. 726, 676 S.E.2d 69 (2009).
As to exemptions, see §§ 207 et seq.

3 Weed v. Board of Revision of Franklin County, 53 Ohio St. 2d 20, 7 Ohio Op. 3d 63, 372 N.E.2d 338 (1978).

4 Home Builders Ass'n of Greater Kansas City v. City of Overland Park, 22 Kan. App. 2d 649, 921 P.2d 234 (1996) (municipal excise tax upon recording of plats within city).

5 Opinion of the Justices of the Supreme Judicial Court, 560 A.2d 552 (Me. 1989) (taxing persons with right-of-way for municipality's maintenance of private road against their will would violate the Due Process Clause).

6 Susquehanna Development, L.L.C. v. Assessor of City of Binghamton, 185 Misc. 2d 267, 712 N.Y.S.2d 817 (Sup 2000).

7 Pocius v. Kenosha County, 231 Wis. 2d 596, 605 N.W.2d 915 (Ct. App. 1999).

8 Premiere RV & Mini Storage LLC v. Maricopa County, 222 Ariz. 440, 215 P.3d 1121 (Ct. App. Div. 1 2009).

9 In re Estate of Matthews, 409 Ill. App. 3d 780, 350 Ill. Dec. 118, 948 N.E.2d 187 (1st Dist. 2011).

10 Mark v. Department of Revenue, 12 Or. Tax 369, 1993 WL 30678 (1993).

11 City of Oklahoma City v. Habana Inn, 1987 OK CIV APP 81, 753 P.2d 400 (Ct. App. Div. 1 1987).

12 University of Hartford v. City of Hartford, 2 Conn. App. 152, 477 A.2d 1023, 18 Ed. Law Rep. 637 (1984); First Nat. Bank of Highland Park v. Mid-Central Food Sales, Inc., 129 Ill. App. 3d 1002, 85 Ill. Dec. 4, 473 N.E.2d 372 (1st Dist. 1984); In re Estate of Olsen, 254 Neb. 809, 579 N.W.2d 529 (1998); Oklahoma Industries Authority v. Barnes, 1988 OK 98, 769 P.2d 115 (Okla. 1988).
Taxes assessed on real property interests become a debt due from the person who holds title to the interest taxed regardless of whether that interest is recorded in the land records. Town of Trumbull v. Palmer, 104 Conn. App. 498, 934 A.2d 323 (2007).

13 Calpine Const. Finance Co. v. Arizona Dept. of Revenue, 221 Ariz. 244, 211 P.3d 1228 (Ct. App. Div. 1 2009).

14 Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App. Texarkana 2008), review denied, (2 pets.) (Mar. 12, 2010) and cert. denied, 131 S. Ct. 2097, 179 L. Ed. 2d 891 (2011).
An entity holds equitable title to property, for purposes of taxation, when it possesses the present right to compel legal title. Harris County Appraisal Dist. v. Primrose Houston 7 Housing, L.P., 238 S.W.3d 782 (Tex. App. Houston 1st Dist. 2007), review denied, (Feb. 12, 2010).

15 Knapp v. City of Jacksonville, 342 Or. 268, 151 P.3d 143 (2007).

16 Supervisor of Assessments of Baltimore County v. Greater Baltimore Medical Center, Inc., 202 Md. App. 282, 32 A.3d 174 (2011).

17 Manchester Water Works v. Town of Auburn, 160 N.H. 330, 999 A.2d 356 (2010).

18 La Grange State Bank v. Village of Glen Ellyn, 227 Ill. App. 3d 308, 169 Ill. Dec. 307, 591 N.E.2d 480 (2d Dist. 1992); Kofmehl v. Steelman, 80 Wash. App. 279, 908 P.2d 391 (Div. 3 1996).

19 Northern Illinois University Foundation v. Sweet, 237 Ill. App. 3d 28, 177 Ill. Dec. 303, 603 N.E.2d 84, 78 Ed. Law Rep. 930 (2d Dist. 1992).

20 Air China Ltd. v. San Mateo County, 174 Cal. App. 4th 14, 93 Cal. Rptr. 3d 893 (1st Dist. 2009), as modified on denial of reh'g, (June 16, 2009).

21 Henderson v. Tax Assessors, Camden County, 156 Ga. App. 590, 275 S.E.2d 78 (1980); In re Estate of Olsen, 254 Neb. 809, 579 N.W.2d 529 (1998); Board of Ed., Hewlett-Woodmere Union Free School Dist. v. Board of Assessors of Nassau County, 54 A.D.2d 978, 389 N.Y.S.2d 27 (2d Dep't 1976).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

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2. Real Estate and Interests Therein

§ 128. What constitutes real property

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West's Key Number Digest

West's Key Number Digest, Taxation 2170 to 2175, 2187

A.L.R. Library

Property taxation of residential time-share or interval-ownership units, 80 A.L.R.4th 950

Real-estate taxation of condominiums, 71 A.L.R.3d 952

Separate assessment and taxation of air rights, 56 A.L.R.3d 1300

The legislature may properly define "real property" for tax purposes.[1] To the extent that there is any ambiguity in a statutory definition of "taxable real property," it must be construed most strongly in favor of the taxpayer and against the taxing authority.[2] However, the labels placed on real estate interests by the parties may not camouflage the underlying reality for tax purposes.[3]

"Real property," as that term is used in statutes, generally connotes a unit of land together with its concomitant improvements, if any.[4] More specifically, "real estate" within tax law is land, with its fixtures and accessories, measurable and capable of description by metes and bounds.[5] However, "real estate" within a statute providing for taxation of all real estate is not always limited to land,[6] and such items as air rights,[7] telephones,[8] or transfer development rights have been held to be taxable as real estate[9] although transferable development rights have also been held not to be "real property."[10] A statute which defines "taxable real property" to include all rights and privileges belonging or pertaining to the land requires some direct relationship between the rights and the property at issue.[11]

In some states, taxation of divided interests in real property is not within the scheme of the taxation statutes.[12] An undivided interest in a jointly owned piece of property may not be taxed separately from the interests of the other cotenants.[13]

It has been held in some jurisdictions that "real property" subject to taxation includes both land held in fee simple, and land held in less than fee simple,[14] such as a qualified or determinable fee.[15] The term "real property," as used in such a statute, includes such easements and appurtenances as appertain to the land itself.[16]

A future interest in real property, rather than a present interest, is not subject to taxation.[17]

A mere license or permit to use real property ordinarily does not give the licensee a taxable interest.[18]

CUMULATIVE SUPPLEMENT

Cases:

The exclusivity factor of the test for determining if a private possessory interest in government-owned real property is taxable ensures that the interest to be taxed is indeed a property interest that is taxable under the state constitution and the revenue statutes. Colo. Const. art. 10, §§ 3, 4; Colo. Rev. Stat. Ann. § 39-1-107. Cantina Grill, JV v. City & County of Denver County Board of Equalization by and through Kennedy, 2015 CO 15, 344 P.3d 870 (Colo. 2015).

Equestrian parcel and stable in planned development subdivision was "open or common space," and therefore city was prohibited from assessing real estate taxes for parcel against property owners' association or anyone other than owners of subdivision's lots; even though parcel was used for commercial enterprises and was open to individuals who were not members of association, real property tax statute included recreational facilities and property used and owned by automatic membership association in its definition of open or common space, and association members who did not board horses used parcel's picnic tables, trails, and parking area. Va. Code Ann. § 58.1-3284.1(A). Saddlebrook Estates Community Association, Inc. v. City of Suffolk, 786 S.E.2d 160 (Va. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc. 2d 1065, 365 N.Y.S.2d 377 (Sup 1975), order aff'd, 57 A.D.2d 926, 395 N.Y.S.2d 42 (2d Dep't 1977), judgment aff'd, 44 N.Y.2d 536, 406 N.Y.S.2d 727, 378 N.E.2d 91 (1978).
As to manufacturing machinery as real estate, see § 120.

2 Frontier Telephone of Rochester v. City of Rochester Assessor, 16 Misc. 3d 471, 842 N.Y.S.2d 188 (Sup 2007).

3 Spinnaker Island and Yacht Club Holding Trust v. Board of Assessors of Hull, 49 Mass. App. Ct. 20, 725 N.E.2d 1072 (2000).

4 National Lead Co. v. Borough of Sayreville, 132 N.J. Super. 30, 331 A.2d 633 (App. Div. 1975).
A sewer line in situ is a permanent installation or fixture upon real property, and because such a sewer line cannot be moved, it is considered by the ad valorem tax code an improvement upon real property and not personal property. Kirby v. Jean's Plumbing Heat & Air, 2009 OK 65, 222 P.3d 21 (Okla. 2009).

5 Magoon v. Board of Civil Authority of Town of Johnson, 140 Vt. 612, 442 A.2d 1276 (1982).
As to fixtures, see § 130.

6 Lin-Wood Development Corp. v. Town of Lincoln, 117 N.H. 709, 378 A.2d 741 (1977).

7 Grey v. Coastal States Holding Co., 22 Conn. App. 497, 578 A.2d 1080 (1990); Appeal of Bigman, 110 Pa. Commw. 539, 533 A.2d 778 (1987).

8 Crystal v. City of Syracuse, Dept. of Assessment, 47 A.D.2d 29, 364 N.Y.S.2d 618 (4th Dep't 1975), order aff'd, 38 N.Y.2d 883, 382 N.Y.S.2d 745, 346 N.E.2d 546 (1976).

9 Mitsui Fudosan (U.S.A.), Inc. v. County of Los Angeles, 219 Cal. App. 3d 525, 268 Cal. Rptr. 356 (2d Dist. 1990).

10 Wilkinson v. St. Jude Harbors, Inc., 570 So. 2d 1332 (Fla. Dist. Ct. App. 2d Dist. 1990).

11 Kankakee County Bd. of Review v. Property Tax Appeal Bd., 226 Ill. 2d 36, 312 Ill. Dec. 638, 871 N.E.2d 38 (2007).

12 State ex rel. Tomasic v. Kansas City, 237 Kan. 572, 701 P.2d 1314 (1985).

13 Kneedler v. League Wide, Inc., 1999 MT 80, 294 Mont. 101, 979 P.2d 163 (1999).

14 Smith v. Department of Revenue, 330 Or. 227, 998 P.2d 675 (2000).

15 State v. Superior Court for Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976).

16 Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598, 134 A.L.R. 958 (1941).

17 First Main Street Corp. v. Board of Assessors of Acton, 49 Mass. App. Ct. 25, 725 N.E.2d 1076 (2000).

18 Metropolitan Stevedore Co. v. County of Los Angeles, 29 Cal. App. 3d 565, 105 Cal. Rptr. 595 (2d Dist. 1972); Millennium Park Joint Venture, LLC v. Houlihan, 393 Ill. App. 3d 13, 331 Ill. Dec. 696, 911 N.E.2d 517 (1st Dist. 2009), judgment aff'd, 241 Ill. 2d 281, 349 Ill. Dec. 898, 948 N.E.2d 1 (2010).
As to the distinction between licenses and leases, see § 131.

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§ 129. Unbenefited property; agricultural and unoccupied land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2199

A "property tax" is levied to pay for the general expenditures deemed to benefit all property owners within a taxing district,[1] but the constitutionality of the imposition of an ad valorem property tax does not require a demonstration of a specific benefit to the property owners who are taxed.[2]

Reminder:
The receipt of direct or specific benefits is not a condition precedent to the payment of taxes which are not an assessment for benefits.[3]

Land may be awarded an agricultural assessment for tax assessment purposes.[4]

Footnotes

1 City of Sacramento v. Drew, 207 Cal. App. 3d 1287, 255 Cal. Rptr. 704, 51 Ed. Law Rep. 998 (3d Dist. 1989), reh'g denied and opinion modified, (Mar. 15, 1989).

2 Griffin v. Anne Arundel County, 25 Md. App. 115, 333 A.2d 612 (1975).

3 § 118.

4 Department of Revenue v. Goembel, 382 So. 2d 783 (Fla. Dist. Ct. App. 5th Dist. 1980); Board of County Com'rs v. Smith, 18 Kan. App. 2d 662, 857 P.2d 1386 (1993).

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§ 130. Fixtures; buildings and other improvements

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West's Key Number Digest

West's Key Number Digest, Taxation 2171, 2174

A.L.R. Library

Electronic computing equipment as fixture, 6 A.L.R.3d 497

For tax purposes, fixtures are a variable hybrid between real and personal property, meaning different things in different contexts.[1]

Practice Tip:

There are practical difficulties in formulating a comprehensive principle for determining which personal property qualifies as fixtures, so as to be valued and taxed as part of the realty, and the determination can only be made from a consideration of all of the individual facts and circumstances attending the particular case.[2] Whether something is a "fixture" for possessory interest tax purposes is predominantly a legal question.[3]

For tax purposes, the terms "real property," "real estate," and "land" include not only the land itself but also all buildings, fixtures, improvements, and rights and privileges appertaining thereto.[4] Whether property qualifies as personal or real for the purposes of taxation is determined by application of the following three tests:

1. whether the property was actually or constructively annexed, attached, or connected to the real estate,[5] and such affixation is unmistakably and inherently permanent;[6]
2. whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and
3. whether the property owner intended to make the property a permanent accession to the realty[7] with that intention being inferred from the nature of the object affixed, the purpose it serves on the land, and the party's relationship to the object and the land.[8]

In respect to the intention of a party affixing an object to realty, the determinative intention, for taxation purposes, is not the subjective intent of the party making the annexation but the intention apparent from the physical facts.[9]

In cases involving tax assessments, it matters not that at the common law, a building or structure might be classified as personal property.[10] It has also been held that in matters relating to taxation, the standards used to determine what are considered to be fixtures as between a grantor and grantee, a vendor and vendee, or a mortgagor and mortgagee should apply rather than the standards applied in landlord-tenant situations.[11]

Trade fixtures[12] and billboards are taxable as real property.[13]

In some situations, improvements to real property, which are owned by somebody other than the owner of the land, may be taxed to the owner of the improvements rather than to the owner of the land.[14] An automated retrieval and storage system which was located in a warehouse was assessable as realty for tax purposes where the system was affixed to the warehouse's ground level and exterior walls, the system provided support for the building's roof so that it could not be removed without damaging the property, and the system was essential to use the upper portion of the storage facility.[15] A clause in a lease may also provide that the tenant will pay any and all property taxes and assessments levied or assessed on the improvements on the leased premises.[16]

CUMULATIVE SUPPLEMENT

Cases:

To be classified as an "improvement to land" so as to be subject to ad valorem taxation as real property, the improvement need not be actually attached to the real estate; constructive attachment may also indicate that a party intended to permanently affix property to real estate. SDCL §§ 10–4–1, 10–4–2(2). Rushmore Shadows, LLC v. Pennington County Bd. of Equalization, 2013 SD 73, 838 N.W.2d 814 (S.D. 2013).

[END OF SUPPLEMENT]

Footnotes

1 General Motors Corp. v. City of Linden, 293 N.J. Super. 99, 679 A.2d 718 (App. Div. 1996), judgment aff'd, 150 N.J. 522, 696 A.2d 683 (1997).

2 In re Equalization Appeals of Total Petroleum, Inc., 28 Kan. App. 2d 295, 16 P.3d 981 (2000).

3 U.S. v. County of San Diego, 53 F.3d 965 (9th Cir. 1995).

4 In re Equalization Appeals of Total Petroleum, Inc., 28 Kan. App. 2d 295, 16 P.3d 981 (2000); Abex Corp. v. Commissioner of Taxation, 295 Minn. 445, 207 N.W.2d 37 (1973); Newman v. State Tax Com'n of Missouri, 781 S.W.2d 193 (Mo. Ct. App. E.D. 1989) (improvements).

5 In re Equalization Appeals of Total Petroleum, Inc., 28 Kan. App. 2d 295, 16 P.3d 981 (2000); Tuinier v. Bedford Charter Tp., 235 Mich. App. 663, 599 N.W.2d 116 (1999); Amoco Production Co. v. Wyoming State Bd. of Equalization, 2001 WY 1, 15 P.3d 728 (Wyo. 2001).

6 R.C. Maxwell Co. v. Galloway Tp., 145 N.J. 547, 679 A.2d 141 (1996); Capri Marina and Pool Club v. Board of Assessors of Nassau County, 84 Misc. 2d 1096, 379 N.Y.S.2d 341 (Sup 1976).

7 In re Equalization Appeals of Total Petroleum, Inc., 28 Kan. App. 2d 295, 16 P.3d 981 (2000); Tuinier v. Bedford Charter Tp., 235 Mich. App. 663, 599 N.W.2d 116 (1999); Amoco Production Co. v. Wyoming State Bd. of Equalization, 2001 WY 1, 15 P.3d 728 (Wyo. 2001).

8 Amoco Production Co. v. Wyoming State Bd. of Equalization, 2001 WY 1, 15 P.3d 728 (Wyo. 2001).

9 Specialty Restaurants Corp. v. County of Los Angeles, 67 Cal. App. 3d 924, 136 Cal. Rptr. 904 (2d Dist. 1977); R.C. Maxwell Co. v. Galloway Tp., 145 N.J. 547, 679 A.2d 141 (1996) (objective view of intent).

10 Capri Marina and Pool Club v. Board of Assessors of Nassau County, 84 Misc. 2d 1096, 379 N.Y.S.2d 341 (Sup 1976).

11 Cherry Bowl, Inc. v. Property Tax Appeal Bd., 100 Ill. App. 3d 326, 55 Ill. Dec. 472, 426 N.E.2d 618 (2d Dist. 1981).

12 Michigan Nat. Bank, Lansing v. City of Lansing, 96 Mich. App. 551, 293 N.W.2d 626 (1980), judgment aff'd, 414 Mich. 851, 322 N.W.2d 173 (1982); State ex rel. Thompson In and For Saline County v. Osage Outdoor Advertising, Inc., 674 S.W.2d 81 (Mo. Ct. App. W.D. 1984).

13 R.C. Maxwell Co. v. Galloway Tp., 145 N.J. 547, 679 A.2d 141 (1996).

14 Morse Signal Devices v. County of Los Angeles, 161 Cal. App. 3d 570, 207 Cal. Rptr. 742 (2d Dist. 1984).

15 Arredondo v. Cumberland County Bd. of Assessment Appeals, 697 A.2d 614 (Pa. Commw. Ct. 1997).

16 Dallas Cent. Appraisal Dist. v. Mission Aire IV, L.P., 279 S.W.3d 471 (Tex. App. Dallas 2009).

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§ 131. Leaseholds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2186, 2188, 2196

A.L.R. Library

Property taxation of residential time-share or interval-ownership units, 80 A.L.R.4th 950

All leases, whether or not antecedent to a taxing statute, are subject to the State's power to tax,[1] and in some jurisdictions, a leasehold is considered real property and is taxable as such.[2] However, it has also been held that leasehold interests are not subject to taxation[3] as a leasehold is not included within the meaning of "real property" or is not considered real estate for the purposes of taxation.[4] Characterizing a lessee's possessory interest in land as an asset of great market value does not transform that interest into a separate legal estate subject to taxation.[5]

Generally, liability for a property tax rests with the owner, not the tenant,[6] even though the lessor's interest is nonpossessory and represents only a fraction of the total value of the property.[7] One who leases property from another does not necessarily become the equitable owner of the property for tax purposes if the lease contains an option to purchase[8] although a lessee may be deemed to be the leased property's equitable owner, for purposes of taxation, if the lessee holds virtually all the benefits and burdens of ownership of the leased property.[9] However, tax liability can be shifted to the lessee if there is an agreement to that effect[10] although it has also been held that the owner of a freehold estate by statute is obligated to pay the tax even though the lessee agreed to pay the taxes.[11]

In some jurisdictions, a property appraiser has no authority to assess taxpayers' interests in their leasehold improvements.[12] However, it has also been held that the interests of a lessee under a term of estate for years are subject to taxation where there are indicia that title to improvements, as well as the leasehold itself, remains in the lessee during the term.[13] Structures which are built by a lessee, with a right to remove them at the conclusion of the lease, are taxable separately to the lessee owner of the structure as real estate owned by the lessee.[14] More specifically, if a right of removal is clearly and explicitly reserved to the tenant in the lease, then in certain circumstances, the tenant will be regarded as an owner of the real estate for the purpose of real property taxation, but the language in the lease indicating the tenant's right to remove a structure is not conclusive of ownership in all cases.[15]

Distinction:

As a license to use real estate is not a taxable interest,[16] a determination whether a given agreement is a lease or a license, for the purpose of taxation, depends not upon what the parties to it choose to call it nor the language but upon the legal effect of its provisions.[17] An instrument is not a demise or lease, for purpose of taxation, although it contains the usual words of demise if its contents show that such was not the intention of the parties.[18]

CUMULATIVE SUPPLEMENT

Cases:

Lessee's use of property for a private benefit tends to show that the lessee's use is independent, as term is used under statute defining possessory interests subject to taxation as right to possession of land or improvements that is independent, and not a mere agency to achieve governmental purposes. Cal. Const. art. 13, § 1; Cal. Rev. & Tax. Code § 107(a)(1); Cal. Civ. Code § 2295. Seibold v. County of Los Angeles, 192 Cal. Rptr. 3d 575 (Cal. App. 2d Dist. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Weaver v. Prince George's County, 34 Md. App. 189, 366 A.2d 1048 (1976), judgment aff'd, 281 Md. 349, 379 A.2d 399 (1977).

2 U.S. v. Metropolitan Government of Nashville and Davidson County, Tenn., 808 F.2d 1205 (6th Cir. 1987); Pacific Southwest Realty Co. v. County of Los Angeles, 1 Cal. 4th 155, 2 Cal. Rptr. 2d 536, 820 P.2d 1046 (1991); Jekyll Development Associates, L.P. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 523 S.E.2d 370 (1999) (estate for years, unlike usufruct, constitutes taxable interest in land).
The term "possessory interests" in a property tax statute includes leaseholds. St. Charles County v. Curators of University of Missouri, 25 S.W.3d 159 (Mo. 2000).

3 Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 349 Ill. Dec. 898, 948 N.E.2d 1 (2010).

4 Board of County Com'rs of Johnson County v. Greenhaw, 241 Kan. 119, 734 P.2d 1125 (1987); D.P.C. Reconstruction Finance Corp. by NL Industries, Inc. v. Assessor of Town of Johnsburg, 135 A.D.2d 224, 525 N.Y.S.2d 404 (3d Dep't 1988).

Leasehold estates are not subject to ad valorem taxation. In re Lipson, 44 Kan. App. 2d 515, 238 P.3d 757 (2010), review denied, (Sept. 21, 2011).

5 Oklahoma Industries Authority v. Barnes, 1988 OK 98, 769 P.2d 115 (Okla. 1988).

6 Ceres Terminals, Inc. v. Chicago City Bank and Trust Co., 259 Ill. App. 3d 836, 200 Ill. Dec. 146, 635 N.E.2d 485 (1st Dist. 1994); Atria Associates v. County of Nassau, 181 A.D.2d 847, 582 N.Y.S.2d 439 (2d Dep't 1992).

7 Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248, 34 A.L.R.5th 859 (Alaska 1993).

8 Leon County Educational Facilities Authority v. Hartsfield, 698 So. 2d 526 (Fla. 1997).

9 Accardo v. Brown, 63 So. 3d 798 (Fla. Dist. Ct. App. 1st Dist. 2011).

10 Elmhurst Group v. Board of Property Assessment Appeals and Review, 20 A.3d 624 (Pa. Commw. Ct. 2011).

11 University of Hartford v. City of Hartford, 2 Conn. App. 152, 477 A.2d 1023, 18 Ed. Law Rep. 637 (1984).

12 Bell v. Bryan, 519 So. 2d 1024 (Fla. Dist. Ct. App. 1st Dist. 1988).

13 Venango Federal Sav. and Loan Ass'n v. Venango County, 73 Pa. Commw. 313, 457 A.2d 1340 (1983).

14 In re Costar Marine Tax Assessment Appeal, 33 Pa. Commw. 447, 382 A.2d 156 (1978).

15 Colleges of the Senecas v. City of Geneva, 94 N.Y.2d 713, 709 N.Y.S.2d 493, 731 N.E.2d 149, 145 Ed. Law Rep. 1102 (2000).

16 § 128.

17 Sandyston Tp. v. Angerman, 134 N.J. Super. 448, 341 A.2d 682 (App. Div. 1975).

18 Sandyston Tp. v. Angerman, 134 N.J. Super. 448, 341 A.2d 682 (App. Div. 1975).

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Part Three. Subjects of Taxation

IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

2. Real Estate and Interests Therein

§ 132. Leaseholds—Lease of exempt real estate

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2186, 2188, 2196, 2315

Even when real estate taxes are only permitted against owners of land, there is an exception which allows the assessor to tax the leasehold interest of the lessee in property leased to it by an owner whose property is exempt.[1] When exempt real estate such as government property is leased to another whose property is not exempt, the leasehold interest is treated as real estate taxable to the lessee.[2]

Observation:

The legislative intent in imposing taxes on a lessee's interest in exempt real property is that the holders of leases of publicly owned land bear the same tax burden as private property owners who devote their land to the same uses[3] and do not receive an unfair advantage.[4]

When privately owned property is leased to a tax-exempt governmental agency, the private owner ordinarily is not entitled to have the exempt agency's leasehold interest segregated from the reversionary fee interest for tax purposes; the owner may be validly assessed on the entire fee.[5]

Footnotes

1 Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 349 Ill. Dec. 898, 948 N.E.2d 1 (2010).

2 DeKalb County Bd. of Tax Assessors v. W. C. Harris & Co., 248 Ga. 277, 282 S.E.2d 880 (1981); Hampton Beach Casino, Inc. v. Town of Hampton, 140 N.H. 785, 674 A.2d 979 (1996); General Motors Corp. v. Oklahoma County Bd. of Equalization, 1983 OK 59, 678 P.2d 233 (Okla. 1983).
As to exemptions, see §§ 280 et seq.
As to lessees of federal property, see § 146.
When a city leases its land, it does not merely use it but creates valuable privately held possessory interests, and the owners of such interests are required to pay taxes on them just as lessees of private property do through increased rents as their use is not public, but private, and as such should carry its share of the tax burden. Silveira v. County of Alameda, 139 Cal. App. 4th 989, 43 Cal. Rptr. 3d 501 (1st Dist. 2006).

3 Walden v. Hillsborough County Aviation Authority, 375 So. 2d 283 (Fla. 1979).

4 City of Detroit v. National Exposition Co., 142 Mich. App. 539, 370 N.W.2d 397 (1985).

5 Tri-Cities Children's Center, Inc. v. Board of Supervisors, 166 Cal. App. 3d 589, 212 Cal. Rptr. 541, 23 Ed. Law Rep. 978 (1st Dist. 1985).

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§ 133. Leaseholds—Perpetual or long-term lease or ground rent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2186, 2188, 2196

Under a lease in perpetuity, the lessee, as the virtual owner of the fee, must pay the taxes on the land.[1] Tenants under 99-year leases from a county were equitable owners and subject to ad valorem property taxes on their leasehold improvements even though the leases were not automatically renewable, and legal title to improvements vested in the county.[2]

A lessee under a ground lease which erects improvements upon the land is endowed with sufficient indicia of ownership to justify the imposition of an ad valorem tax upon the improvements, where the title to the improvements remained in the lessee throughout the duration of the lease, and in the event that the lease was prematurely terminated by the lessor or abandoned by the lessee, the improvements passed to the lessor through payment to the lessee of their cost, less depreciation.[3]

Footnotes

1. Hampton Beach Casino, Inc. v. Town of Hampton, 140 N.H. 785, 674 A.2d 979 (1996); Weyerhaeuser Co. v. Town of Hancock, 151 Vt. 279, 559 A.2d 158 (1989).
2. 1108 Ariola, LLC v. Jones, 71 So. 3d 892 (Fla. Dist. Ct. App. 1st Dist. 2011).
3. Parker v. Hertz Corp., 544 So. 2d 249 (Fla. Dist. Ct. App. 2d Dist. 1989).

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§ 134. Mobile homes; mobile home parks

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2171, 2176

A.L.R. Library

Classification, as real estate or personal property, of mobile homes or trailers for purposes of state or local taxation, 7 A.L.R.4th 1016

Some statutes specifically classify house trailers or mobile homes as real property for tax purposes.[1] The intent of a statute adding mobile homes to the definition of "real property" under a real property tax law was to have mobile home owners pay their fair share of the real estate taxes which support municipal services.[2]

A mobile home may also be subject to taxation as an improvement to real estate or fixture where it is utilized as a permanent dwelling.[3]

In determining whether a mobile home is to be taxed as real property, some jurisdictions examine whether the mobile home is intended to remain on the site permanently,[4] or has a "permanent foundation,"[5] or whether the mobile home is "off its wheels" and "set upon some other support" and is therefore "set upon a foundation."[6]

The land owner is generally responsible for the taxes attributable to mobile homes on its property.[7]

A judgment against a lienholder imposing liability for delinquent property taxes on mobile homes is proper where the

lienholder is shown to be the owner by repossession.[8] However, a secured creditor which finances mobile homes and has a right to repossess them upon the purchaser's default does not own the property until it repossesses the mobile homes.[9]

Footnotes

1 New York Mobile Homes Ass'n v. Steckel, 9 N.Y.2d 533, 215 N.Y.S.2d 487, 175 N.E.2d 151, 86 A.L.R.2d 270 (1961).

2 Frontier Park v. Assessor of Town of Babylon, 184 Misc. 2d 354, 707 N.Y.S.2d 808 (Sup 2000).

3 Commercial Tp. v. Block 136, Lot 2, Now Lot 13, 179 N.J. Super. 307, 431 A.2d 862, 34 U.C.C. Rep. Serv. 760 (Ch. Div. 1981).
As to fixtures, generally, see § 130.

4 Koester v. Hunterdon County Bd. of Taxation, 79 N.J. 381, 399 A.2d 656, 7 A.L.R.4th 1004 (1979).

5 Lee County Bd. of Review v. Property Tax Appeal Bd., 278 Ill. App. 3d 711, 215 Ill. Dec. 462, 663 N.E.2d 473 (2d Dist. 1996).

6 Ahrens v. Town of Fulton, 240 Wis. 2d 124, 2000 WI App 268, 621 N.W.2d 643 (Ct. App. 2000), decision aff'd, 2002 WI 29, 251 Wis. 2d 135, 641 N.W.2d 423 (2002).

7 Frontier Park v. Assessor of Town of Babylon, 184 Misc. 2d 354, 707 N.Y.S.2d 808 (Sup 2000).

8 General Elec. Capital Corp. v. City of Corpus Christi, 850 S.W.2d 596, 20 U.C.C. Rep. Serv. 2d 616 (Tex. App. Corpus Christi 1993), writ denied, (Sept. 10, 1993).

9 State v. Lincoln Corp., 596 S.W.2d 593 (Tex. Civ. App. Beaumont 1980), writ refused n.r.e., (June 25, 1980).

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3. Credits and Contractual Rights; Claims for Damages

§ 135. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170, 2184

Contract rights are ordinarily subject to a State's powers of taxation.[1] However, the power of the legislature to impose burdens upon the subject matter of contracts cannot be extended to permit the enactment of a statute, even in the guise of taxation, which will impair the obligation of a contract as between the persons, firms, or corporations who entered into it.[2]

The catch-all phrase "and any and all other credits and evidences of indebtedness whether secured or unsecured" in a statutory definition of "intangible personal property" is limited by specific categories of property encompassed within the reach of the statute, dealing with various types of specific financial exchanges and investments, including ownership and creditor interest in corporations, annuities, as well as certain commercial transactions.[3]

Various items have been held subject to an intangible personal property tax, such as installment notes taken by a corporation which advanced funds to individuals for the purchase of an automobile or recreational vehicle from unrelated third parties,[4] a promissory note that was not secured by real property,[5] participation agreements by which a taxpayer purchased an undivided interest in a loan which was previously made by a bank to one of its customers,[6] and agreements for a deed executed in connection with the sale of real property.[7]

CUMULATIVE SUPPLEMENT

Cases:

Federal tax laws governing partnerships did not bar New York tax authorities from disallowing corporate taxpayer's claim for credit based on payment in lieu of taxes (PILOT) agreement of certified Qualified Empire Zone Enterprise (QEZE) in which taxpayer's subsidiary held interest, even though federal tax laws required tax treatment of any partnership item to be determined at partnership level and that, generally, three-year statute of limitations applied to such partnership items, where taxpayer did not identify any analogous provision in state law that required determination of QEZE's entitlement to credit prior to taxpayer filing return seeking credit. 26 U.S.C.A. §§ 6221, 6229(a); McKinney's General Municipal Law § 958; McKinney's Tax Law § 15(a, e). Wilmorite, Inc. v. Tax Appeals Tribunal of State, 130 A.D.3d 1388, 2015 WL 4558299 (3d Dep't 2015).

[END OF SUPPLEMENT]

Footnotes

[1] In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

[2] Cole v. Pond Fork Oil & Gas Co., 127 W. Va. 762, 35 S.E.2d 25, 160 A.L.R. 970 (1945).

[3] Benedict v. Department of Treasury, 236 Mich. App. 559, 601 N.W.2d 151 (1999).
As to intangible personal property, generally, see § 124.

[4] Allstate Enterprises, Inc. v. State, Dept. of Revenue, 398 So. 2d 849 (Fla. Dist. Ct. App. 1st Dist. 1981).

[5] Lagrone v. Telecash Investments, Inc., 220 Ga. App. 876, 470 S.E.2d 445 (1996).

[6] Indiana State Dept. of Revenue, Income Tax Division v. Valley Financial Services, Inc., 435 N.E.2d 68 (Ind. Ct. App. 1982).

[7] State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson, 322 So. 2d 525 (Fla. 1975).

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3. Credits and Contractual Rights; Claims for Damages

§ 136. Judgments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170

Trial Strategy

Taxation of Litigation Recoveries, 47 Am. Jur. Trials 591

There is no objection to a tax on judgments assessed upon the judgment creditor as owner when there is no discrimination made between different classes of judgments.[1]

Interest on a taxpayer's personal injury judgment is not "intangible personal property," subject to an intangibles tax assessment; the interest did not fall within either the statutory definition's specific examples of intangible personal property or the catch-all phrases for various types of specific commercial exchanges and investments.[2]

Footnotes

[1] Hamilton v. Wilson, 61 Kan. 511, 59 P. 1069 (1900); Pryor v. Marion County, 140 Tenn. 399, 204 S.W. 1152 (1918).

[2] Benedict v. Department of Treasury, 236 Mich. App. 559, 601 N.W.2d 151 (1999).

As to intangible personal property, generally, see § 124.

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4. Interest in Property Under Contract of Sale

§ 137. Realty

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2184, 2187 to 2190

While the broad rule has been laid down to the effect that the owner of property for the purpose of taxation is the person having the legal title or estate thereto or therein, and not one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself or herself,[1] there is also authority that when the vendee of realty under an executory contract of sale is in possession on the assessment day, the vendee may be taxed as the owner.[2] In such cases, the vendee is liable upon the theory that he or she is the beneficial owner of the land and the vendor the beneficial owner of the purchase money,[3] and the equitable holder of real property, rather than the holder of the bare legal title, is subject to taxation.[4]

Footnotes

1 Rampton v. Dobson, 156 Iowa 315, 136 N.W. 682, 3 A.L.R. 569 (1912); Williams v. Board of Com'rs of Osage County, 84 Kan. 508, 114 P. 858 (1911); Stillman v. Lynch, 56 Utah 540, 192 P. 272, 12 A.L.R. 552 (1920).

2 Ex parte State, 206 Ala. 575, 90 So. 896 (1921); Commonwealth v. First Christian Church of Louisville, 169 Ky. 410, 183 S.W. 943 (1916), opinion modified on other grounds on denial of reh'g, Commonwealth v. First Christian Church of Louisville, 171 Ky. 62, 186 S.W. 880 (1916); Bowls v. Oklahoma City, 1909 OK 149, 24 Okla. 579, 104 P. 902 (1909).

3 Olds v. Little Horse Creek Cattle Co., 22 Wyo. 336, 140 P. 1004 (1914).

4 First Union Nat. Bank of Florida v. Ford, 636 So. 2d 523 (Fla. Dist. Ct. App. 5th Dist. 1993).

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4. Interest in Property Under Contract of Sale

§ 138. Personalty

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2176, 2184

A former owner, which has sold personal property and is not the owner of such property in the years in question, has no statutory duty to list that property for taxation, or obligation to pay the ad valorem taxes assessed against that property,[1] although the owner may be liable if the title passes after a certain date specified by statute.[2]

Footnotes

1 Mid-State Service Co., Inc. v. Dunford, 18 N.C. App. 641, 197 S.E.2d 626 (1973).

2 Timber Traders, Inc. v. Johnston, 87 Wash. 2d 42, 548 P.2d 1080 (1976).

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4. Interest in Property Under Contract of Sale

§ 139. Conditional sales and option contracts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2184, 2187 to 2190

Generally, where a vendee is in possession of property under a subsisting conditional sales contract, he or she alone is responsible for taxes thereon.[1] A lessor is subject to taxation on personal property despite some evidence that the transactions in which the property was "leased" are really financing arrangements which constitute conditional sales.[2]

Footnotes

1 Ex parte State, 206 Ala. 575, 90 So. 896 (1921); Automatic Voting Mach. Corp. v. Maricopa County, 50 Ariz. 211, 70 P.2d 447, 116 A.L.R. 320 (1937); Kullman Dining Car Co. v. Borough of East Paterson, 97 N.J. Super. 536, 235 A.2d 499 (Law Div. 1967).

2 Custom Leasing Co. of Ohio v. Limbach, 62 Ohio St. 3d 7, 577 N.E.2d 348 (1991).

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5. Minerals and Mineral Rights

§ 140. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2172

A.L.R. Library

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728

A mineral interest that has been severed from the surface land is real property subject to taxation.[1] A mineral interest is real estate,[2] and mineral interests in land, when severed, may be taxed separately,[3] and such tax is not so arbitrary as to violate due process.[4] When a grantor reserves a life estate in a mineral deed, such that the life tenant of the mineral interest and the fee title holder of the surface rights are the same person, the remainder interest does not become taxable until the remainderman is vested with the right of possession upon termination of the life estate.[5]

Both a taxpayer's leasehold interests in subsurface and surface limestone are "lands" subject to real estate taxation.[6]

Before a state or county can separately assess the value of the surface estate of a mining claim, for tax purposes, the assessor must have notice that the surface estate has a value independent from its value as a part of the mining claim, and if an independent value is not visibly obvious, the surface user must notify the assessor of that use and request a separate assessment.[7] For a mineral estate assessment to be valid, the mineral estate listing on the tax books must be subjoined to the surface estate.[8] However, a conveyance of minerals in place is not required to effect sufficient severance of mineral interests to invoke a separate assessment statute.[9]

After a mineral estate has been severed by the owner from the land, the land is assessed for taxes, and the owner of the mineral estate is liable for taxes to the same extent that property owners are liable for any other tax.[10]

For tax purposes, once minerals are severed from the soil in which they are embedded, they become personal property.[11]

Footnotes

1 Groome v. Donlin Corp., 908 N.E.2d 330 (Ind. Ct. App. 2009).

2 Straughn v. Sun Oil Co. (Delaware), 345 So. 2d 1062 (Fla. 1977); State ex rel. Svoboda v. Weiler, 205 Neb. 799, 290 N.W.2d 456 (1980).

3 Howard v. County of Amador, 220 Cal. App. 3d 962, 269 Cal. Rptr. 807 (3d Dist. 1990); In re Payment of Taxes, 181 Ill. App. 3d 646, 130 Ill. Dec. 291, 537 N.E.2d 358 (5th Dist. 1989); Machipongo Land & Coal Co., Inc. v. Com., Dept. of Environmental Resources, 719 A.2d 19 (Pa. Commw. Ct. 1998).

4 Contos v. Herbst, 278 N.W.2d 732 (Minn. 1979).

5 Goodspeed v. Skinner, 9 Kan. App. 2d 557, 682 P.2d 686 (1984).

6 Coolspring Stone Supply, Inc. v. County of Fayette, 593 Pa. 338, 929 A.2d 1150 (2007).

7 United Park City Mines Co. v. Estate of Clegg, 737 P.2d 173 (Utah 1987).

8 Hurst v. Rice, 278 Ark. 94, 643 S.W.2d 563 (1982).

9 Edwards v. Hall, 267 Ark. 1003, 593 S.W.2d 465 (Ct. App. 1980).

10 Duval County Ranch Co. v. State, 587 S.W.2d 436 (Tex. Civ. App. San Antonio 1979), writ refused n.r.e., (Jan. 16, 1980).

11 Board of Review of County of Alexander v. Property Tax Appeal Bd., 304 Ill. App. 3d 535, 238 Ill. Dec. 118, 710 N.E.2d 915 (5th Dist. 1999).
As to taxation of personal property, generally, see § 123.

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IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

5. Minerals and Mineral Rights

§ 141. Gas and oil

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170, 2172

In some jurisdictions, oil and gas production is a proper element in determining the assessed valuation of real estate but cannot be assessed as a separate interest in land.[1] Natural gas in the ground is taxed as real property while gas reduced to possession by being detached from the ground is subject to a gross production tax.[2] However, other jurisdictions may classify oil and gas interests as realty for the purposes of taxing such interests[3] where they are owned by a person other than the owner of the rest of the land.[4]

In some jurisdictions, leasehold interests in oil and gas rights are taxable as separate parcels of real estate, separate and apart from the rest of the land.[5] However, it has also been held that oil is an incorporeal hereditament possessing transitory characteristics until reduced to actual possession, and leases are not taxable as real property.[6]

Footnotes

1 Board of Com'rs of Sullivan County v. Heap, 155 Ind. App. 633, 294 N.E.2d 182 (1973).

2 Samson Hydrocarbons Co. v. Oklahoma Tax Com'n, 1998 OK 82, 976 P.2d 532 (Okla. 1998).

3 Federal Land Bank of Wichita v. Board of County Com'rs of Adams County, 788 F.2d 1440 (10th Cir. 1986); California Minerals v. County of Kern, 152 Cal. App. 4th 1016, 62 Cal. Rptr. 3d 1 (5th Dist. 2007); Pennsylvania Bank & Trust Co., Youngsville Branch v. Dickey, 232 Pa. Super. 224, 335 A.2d 483 (1975); Hill v. Enerlex, Inc., 969 S.W.2d 120 (Tex. App. Eastland 1998).

4 State v. Superior Court for Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976).

5 State v. Superior Court for Maricopa County, 113 Ariz. 248, 550 P.2d 626 (1976); Sun Oil Co. (Delaware) v. Fisher, 370 So. 2d 413 (Fla. Dist. Ct. App. 1st Dist. 1979).
As to taxation of leaseholds, generally, see § 131.

6 Board of Com'rs of Sullivan County v. Heap, 155 Ind. App. 633, 294 N.E.2d 182 (1973).

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IX. Property and Interests Taxable, Generally

B. Specific Subjects and Persons Taxable

5. Minerals and Mineral Rights

§ 142. Royalties under oil and gas lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2170, 2172, 2184

In some jurisdictions, royalty interests are considered personal property and are taxed as personal property[1] while in others, a lessor of mineral interest's right to receive royalties is considered an interest in real property and is taxable as such.[2] Where accrued royalties under an oil and gas lease are personal property, they can only be taxed in accordance with the general provisions of law.[3]

The mere fact that a government imposing a tax also enjoys rents and royalties as the lessor of mineral lands does not undermine the government's authority to impose the tax.[4]

Footnotes

1 City of Liberal v. Seward County, 247 Kan. 609, 802 P.2d 568 (1990).

2 Pounds v. Jurgens, 296 S.W.3d 100 (Tex. App. Houston 14th Dist. 2009), review denied, (Oct. 22, 2010).

3 Cole v. Pond Fork Oil & Gas Co., 127 W. Va. 762, 35 S.E.2d 25, 160 A.L.R. 970 (1945).
As to taxation of personal property, generally, see § 123.

4 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

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X. Property, Agencies, and Instrumentalities of United States

A. General Principles

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 3411

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A. General Principles

§ 143. Generally

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West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 3411

A State may not, consistent with the Supremacy Clause,[1] directly tax the United States.[2] In other words, under principles of sovereign immunity, the federal government is immune from state taxation absent its consent.[3]

Distinction:

Unlike a State's immunity from federal taxation, which is somewhat limited, the federal government's immunity from state taxation is a blanket immunity.[4]

States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals.[5] A tax is considered to be directly on the federal government only when the levy falls on the United States itself.[6] If the government is affected by the state tax only through the increased cost of services or materials, the tax is valid.[7]

The United States clearly has immunity if a service fee imposed by a municipality or State is a tax.[8]

Under the intergovernmental tax immunity doctrine, the federal government is immune from taxation imposed by the State unless that immunity is waived, explicitly or expressly, by a statutory waiver of that immunity.[9] When a statute waives a

federal government's freedom from local taxation, that language is narrowly construed because it defeats the immunity shielding the federal government.[10] By federal statute, officers and agents conducting any business under the authority of a United States court are subject to all state and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.[11]

CUMULATIVE SUPPLEMENT

Cases:

As federally chartered agencies, the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Housing Finance Agency (FHFA) as conservator for Fannie Mae and Freddie Mac, are governmental instrumentalities which Congress had the authority to protect by exempting them from taxation imposed by the States, though Fannie Mae and Freddie Mac were privatized. Federal Home Loan Mortgage Corporation Act, § 303(e), 12 U.S.C.A. § 1452(e); National Housing Act, § 309(c)(2), 12 U.S.C.A. § 1723a(c)(2); Housing and Community Development Act of 1992, § 1367(j)(2), 12 U.S.C.A. § 4617(j)(2). Hennepin County v. Federal Nat. Mortg. Ass'n, 742 F.3d 818 (8th Cir. 2014).

It is a fundamental principle of constitutional law that the United States is immune from direct taxation by state and local governments, including counties. DeKalb County, Georgia v. United States, 108 Fed. Cl. 681 (2013).

[END OF SUPPLEMENT]

Footnotes

1 Hudson Valley Federal Credit Union v. New York State Dept. of Taxation and Finance, 28 Misc. 3d 1001, 906 N.Y.S.2d 680 (Sup 2010), judgment aff'd, appeal dismissed, 85 A.D.3d 415, 924 N.Y.S.2d 360 (1st Dep't 2011), leave to appeal granted, 17 N.Y.3d 712, 933 N.Y.S.2d 652, 957 N.E.2d 1156 (2011).

2 U.S. v. Anderson County, Tenn., 705 F.2d 184 (6th Cir. 1983); U.S. v. Lewis County, 175 F.3d 671 (9th Cir. 1999); Standard Oil Co. of California v. Pastorino, 94 Nev. 291, 580 P.2d 118 (1978).

3 California Farm Bureau Federation v. State Water Resources Control Bd., 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified, (Apr. 20, 2011).

4 U.S. v. City of Columbia, Mo., 914 F.2d 151 (8th Cir. 1990).

5 South Carolina v. Baker, 485 U.S. 505, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988); U.S. v. State of Del., 958 F.2d 555 (3d Cir. 1992); U.S. v. Lohman, 74 F.3d 863 (8th Cir. 1996).
Although the federal government is absolutely immune from direct taxes, it is not immune from taxes merely because they have an "effect" on it or even because the government shoulders entire economic burden of the levy. U.S. v. California, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993).

6 U.S. v. State of Del., 958 F.2d 555 (3d Cir. 1992).

7 Federal Reserve Bank of Boston v. Commissioner of Corporations and Taxation of Com. of Mass., 520 F.2d 221 (1st Cir. 1975); Harvey F. Gamage, Shipbuilder, Inc. v. Halperin, 359 A.2d 72 (Me. 1976).

8 U.S. v. City of Huntington, W.Va., 999 F.2d 71 (4th Cir. 1993).

9 State v. Farm Credit Services of Cent. Arkansas, 338 Ark. 322, 994 S.W.2d 453 (1999).

[10] National R.R. Passenger Corp. v. Com. of Pa. Public Utility Com'n, 848 F.2d 436 (3d Cir. 1988).

[11] 28 U.S.C.A. § 960(a).

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A. General Principles

§ 144. Federal agencies and instrumentalities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 3411

A State may not levy a tax directly upon a connected agent or instrumentality of the United States,[1] and a tax which interferes with a "federal instrumentality" is void.[2] There is no simple test for ascertaining whether an institution is so closely related to the governmental activity as to become a tax-immune instrumentality.[3] Absolute tax immunity is appropriate only when the tax is imposed on an agency or instrumentality so closely connected to the United States government that the two cannot be realistically viewed as separate entities, at least insofar as the activity being taxed is concerned.[4] The performance of governmental functions is a broad test for whether an entity is a federal instrumentality.[5] However, a private party does not become a tax-immune instrumentality of the federal government merely because the party does business with the United States.[6]

Practice Tip:

The "federal instrumentality" doctrine holds that the United States may sue on its own behalf or on behalf of its "instrumentalities" in federal court to avoid allegedly unconstitutional state taxation.[7]

Congress has not been content to let the freedom of all federal instrumentalities depend upon the doctrine of implied constitutional immunity but has granted some of them a measure of express exemption from taxation,[8] which it has full power to do with regard to agencies and instrumentalities that it creates or authorizes.[9] When Congress constitutionally creates a

corporation through which the federal government lawfully acts, the activities of such corporation are governmental, and Congress has the power to protect them by prescribing tax immunity for them.[10] The policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the government; the power stems from the power to preserve and protect functions validly authorized, that is, the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress.[11]

A federal instrumentality is immune from all state taxes, whether or not discriminatory, unless the State can show that Congress clearly and expressly has waived the immunity.[12] Congressional consent for waiver of immunity from state taxation enjoyed by property owned by a federal instrumentality must be clear, express, and affirmative, and congressional waivers from tax exemptions must be strictly construed.[13]

Footnotes

1 U.S. v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988); State v. Farm Credit Services of Cent. Arkansas, 338 Ark. 322, 994 S.W.2d 453 (1999); Sooner Federal Sav. & Loan Ass'n v. Oklahoma Tax Com'n, 1982 OK 118, 662 P.2d 1366 (Okla. 1982).
As to national banks as federal instrumentalities, see § 156.

2 Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash. 2d 7, 541 P.2d 699 (1975).

3 Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975).

4 Indiana Dept. of State Revenue v. Farm Credit Services of Mid-America, ACA, 734 N.E.2d 551 (Ind. 2000) (abrogated on other grounds by, Director of Revenue of Missouri v. CoBank ACB, 531 U.S. 316, 121 S. Ct. 941, 148 L. Ed. 2d 830 (2001)).

5 TI Federal Credit Union v. DelBonis, 72 F.3d 921, 106 Ed. Law Rep. 33 (1st Cir. 1995); Lewis v. U.S., 680 F.2d 1239 (9th Cir. 1982).
The Red Cross was an instrumentality of the United States that was immune from state and local taxation on lawfully conducted gambling activities despite a city's reference to the fact that the Red Cross was not considered an agency for purposes of the Freedom of Information Act. U.S. v. City of Spokane, 918 F.2d 84 (9th Cir. 1990).

6 Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975).

7 Housing Authority of City of Seattle v. State of Wash., Dept. of Revenue, 629 F.2d 1307 (9th Cir. 1980).

8 Graves v. People of State of New York ex rel. O'Keefe, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A.L.R. 1466 (1939).
As to exemptions, see §§ 207 et seq.

9 City of Cleveland v. U.S., 323 U.S. 329, 65 S. Ct. 280, 89 L. Ed. 274 (1945).

10 Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941).

11 Carson v. Roane-Anderson Co., 342 U.S. 232, 72 S. Ct. 257, 96 L. Ed. 257 (1952).

12 St. Louis County v. Federal Land Bank of St. Paul, 338 N.W.2d 741 (Minn. 1983).

13 U.S. v. City of Adair, 539 F.2d 1185 (8th Cir. 1976).

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West's Key Number Digest, Taxation 2006, 2064, 2089, 2273

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Forms

Am. Jur. Pleading and Practice Forms, State and Local Taxation §§ 190, 191

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§ 145. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

Although states may not tax the federal government or its property directly, they may tax private parties who use federal property,[1] and the value or amount of such property becomes the partial or exclusive basis for the measurement of the tax.[2] Privately held possessory interests in property owned by the federal government are subject to taxation,[3] but tax measures levied on the property itself are invalid.[4]

The federal government's immunity from state taxation inherent in the Supremacy Clause of the United States Constitution did not prevent a State from taxing employees of the United States Forest Service on their possessory interests in housing owned and supplied to them by the federal government as part of their compensation.[5] However, it has also been held that even if a serviceman living in government-supplied housing had a "possessory interest" within the contemplation of a state's possessory interest tax, such tax would still be constitutionally impermissible as the tax was one imposed upon federal functions and properties.[6]

In determining whether property is owned by the United States, so as to be immune from state and local taxation, the appropriate test turns on practical ownership of the property rather than the holding of the naked legal title.[7]

Mere acquisition of title by the United States is not sufficient to debar a State from exercising taxing and police power in relationship to the acquired property; to completely exclude the authority of the State under the Federal Constitution, it must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction that it would otherwise be free to exercise.[8]

Property purchased by a private person from the federal government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government even though the prospect of taxation by the State may reduce the amount that the United States might receive from the sale of its property.[9]

The Buck Act[10] extends to state and local taxing authorities jurisdiction to levy taxes in a federal area within its borders as though the area was not a federal area.[11] The Act does not limit the states' authority to impose limitations on local governments' authority to levy and collect taxes.[12]

Footnotes

1 U. S. v. New Mexico, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982); U.S. v. Nye County, Nev., 178 F.3d 1080 (9th Cir. 1999).

2 Union Carbide Corp. v. Alexander, 679 S.W.2d 938 (Tenn. 1984).

3 U.S. v. Nye County Nev., 938 F.2d 1040 (9th Cir. 1991); Connolly v. County of Orange, 1 Cal. 4th 1105, 4 Cal. Rptr. 2d 857, 824 P.2d 663, 72 Ed. Law Rep. 1089 (1992), as modified, (Mar. 26, 1992); Mesa Verde Co. v. Montezuma County Bd. of Equalization, 898 P.2d 1 (Colo. 1995).

4 U.S. v. Nye County Nev., 938 F.2d 1040 (9th Cir. 1991).

5 U. S. v. Fresno County, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977).

6 U.S. v. Humboldt County, Cal., 628 F.2d 549 (9th Cir. 1980).

7 Rohr Aircraft Corp. v. San Diego County, 362 U.S. 628, 80 S. Ct. 1050, 4 L. Ed. 2d 1002 (1960).

8 Shell Oil Co. v. Secretary, Revenue and Taxation, 683 So. 2d 1204 (La. 1996).

9 Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949).

10 4 U.S.C.A. §§ 105(a), 106(a).

11 Riverside v. State, 190 Ohio App. 3d 765, 2010-Ohio-5868, 944 N.E.2d 281 (10th Dist. Franklin County 2010), appeal not allowed, 128 Ohio St. 3d 1447, 2011-Ohio-1618, 944 N.E.2d 696 (2011).

12 Riverside v. State, 190 Ohio App. 3d 765, 2010-Ohio-5868, 944 N.E.2d 281 (10th Dist. Franklin County 2010), appeal not allowed, 128 Ohio St. 3d 1447, 2011-Ohio-1618, 944 N.E.2d 696 (2011).

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§ 146. Lessee of governmental property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

A nondiscriminatory state tax on the lessee of government property does not violate the government's constitutional immunity from state taxation.[1] The states may levy and collect taxes from federal lessees of mineral land as though the federal government were not concerned so that the manner in which the federal government collected receipts from its mineral lessees and then shared them with the states has no bearing on the validity of a state tax.[2] A lessee's possessory interest in land owned by the United States is "real property" within the meaning of statutory and constitutional provisions defining "real property" for tax purposes.[3] Although a state tax on leasehold interests on property leased from the United States might reduce the market for such interests, the imposition of an increased financial burden on the government does not, by itself, vitiate the state tax.[4]

A state statute under which a county may impose an ad valorem tax against a lessee or user of tax-exempt property in the same amount and to the same extent as though the lessee or user were the owner of the property effectively lays an ad valorem tax on property owned by the United States and is unconstitutional under the Supremacy Clause.[5]

Caution:

There is state case law indicating that a State does not violate the supremacy clause by using the full, fair market value of federal land as a basis for taxing a nonfederal lessee.[6]

However, a state tax may not discriminate against the government or those with whom it deals,[7] and a State may not tax the leasehold estate of a lessee of the federal government at full value, including the buildings and improvements thereon, while taxing other leaseholds at actual value, excluding the value of improvements.[8]

Footnotes

1 U.S. v. City of Detroit, 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958).

2 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).
As to leases of exempt real estate, generally, see § 132.

3 Mesa Verde Co. v. Montezuma County Bd. of Equalization, 898 P.2d 1 (Colo. 1995).

4 Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975).

5 U.S. v. Nye County Nev., 938 F.2d 1040 (9th Cir. 1991).
As to exemptions, see §§ 207 et seq.

6 Standard Oil Co. of California v. Pastorino, 94 Nev. 291, 580 P.2d 118 (1978).

7 Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S. Ct. 870, 6 L. Ed. 2d 66 (1961); Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S. Ct. 474, 4 L. Ed. 2d 384 (1960).

8 Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 S. Ct. 870, 6 L. Ed. 2d 66 (1961).

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§ 147. Property or business on government land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

Generally, a State or territory may tax personal property situated on land owned by the United States within its limits provided that such personal property does not belong to the United States or to tribal Indians or is not otherwise exempt from taxation.[1] However, unless Congress specifically waives immunity from taxation, property located on land over which the United States has exclusive jurisdiction is not taxable.[2]

Footnotes

1 Humble Pipe Line Co. v. Waggoner, 376 U.S. 369, 84 S. Ct. 857, 11 L. Ed. 2d 782 (1964).
As to taxation of Indian property, generally, see § 151.

2 Visicon, Inc. v. Tracy, 83 Ohio St. 3d 211, 1998-Ohio-115, 699 N.E.2d 89 (1998).

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§ 148. Registration fee or tax on mortgages or loans of federal agencies

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

A State has no power to require a federal savings and loan association located in the state to pay documentary stamp taxes on promissory notes executed by the association in favor of a Federal Home Loan Bank to cover loans from the bank to the association in view of the provision in a federal statute exempting from state taxation the bank, its franchise, and "its advances."[1]

Footnotes

1 Laurens Federal Sav. and Loan Ass'n v. South Carolina Tax Commission, 365 U.S. 517, 81 S. Ct. 719, 5 L. Ed. 2d 749 (1961).

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§ 149. Contractors with United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

Although a federal contractor may be immune from state taxation under affirmative action by Congress,[1] a private party does not become a tax-immune instrumentality of the federal government merely because the party has a contract with the United States.[2]

A cost-plus contractor for profit which performed work for the United States was not so incorporated into the United States structure as to be an instrumentality of the United States and thus enjoy governmental immunity from state tax on the contractor's beneficial use of government owned property.[3]

In examining the constitutionality of state taxation under the supremacy clause, the dispositive question is whether the incidence of taxation falls directly upon the federal government or upon a private contracting entity.[4] Private parties who contract with and do business with the United States can be taxed even though the increased financial burden will ultimately fall on the United States.[5] Additionally, the use of property of the United States may be taxed to a private contractor, even if the economic burden of the tax is ultimately borne by the United States, but only to the extent that the contractor has the beneficial use of the property; that is, the contractor may not be taxed beyond the value of his or her use.[6]

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision by so expressly providing as respects contracts in a particular form or contracts under particular programs; if political or economic considerations suggest that a broader immunity rule is appropriate, such complex problems are ones which Congress is best qualified to resolve.[7] Immunity from state taxation of gross receipts is expanded beyond its narrow constitutional limits only when Congress expressly exempts private federal contractors' activities from taxation.[8]

State taxes on contractors are constitutionally invalid if they discriminate against the federal government or substantially interfere with its activities.[9] A state sales tax imposed on federal contractors is not invalid under the Supremacy Clause of the

United States Constitution where the State imposes a sales tax of the same rate on all purchases from contractors who do not deal with the federal government and where the only deviation from equality between the federal government and federal contractors on one hand, and every other taxpayer on the other hand, is that the former are taxed on a smaller proportion of the value of the project than the latter; the federal government and federal contractors are both better off than other taxpayers because they pay less tax than anyone else in the state, and this is not mistreatment of the federal government against which the Supremacy Clause protects; federal contractors are required to pay no greater tax than that placed on private buyers of construction work or passed on by them to their contractors; the State has not singled out contractors who work for the United States for discriminatory treatment, and the State has merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner.[10]

To successfully defend a Supremacy Clause challenge to a tax on persons or entities that contract with the federal government, the taxing authority must segregate and tax only the beneficial or possessory interest in the property.[11]

One having a contract to carry the mails is not immune as an agency of the federal government from state taxation of property used in the performance of such contract even though the tax is based upon the gross receipts from his or her contract with the government.[12]

Footnotes

1 Carson v. Roane-Anderson Co., 342 U.S. 232, 72 S. Ct. 257, 96 L. Ed. 257 (1952).

2 Washington v. U.S., 460 U.S. 536, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983); Miller v. Bauer, 517 F.2d 27 (7th Cir. 1975).
The sovereign immunity of the United States from direct state taxation did not extend to an independent contractor operating and managing a federal facility under an advanced funding arrangement. U.S. v. State of Cal., 932 F.2d 1346 (9th Cir. 1991), judgment aff'd, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993).

3 U.S. v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988).
As to federal agencies and instrumentalities, see § 144.

4 State v. Kelly-Ryan, Inc., 110 Nev. 276, 871 P.2d 331 (1994).

5 Aviall Services, Inc. v. Tarrant Appraisal Dist., 300 S.W.3d 441 (Tex. App. Fort Worth 2009).

6 U.S. v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988).

7 U. S. v. New Mexico, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).

8 Arizona Dept. of Revenue v. Blaze Const. Co., Inc., 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999).

9 U. S. v. New Mexico, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982).

10 Washington v. U.S., 460 U.S. 536, 103 S. Ct. 1344, 75 L. Ed. 2d 264 (1983).

11 California Farm Bureau Federation v. State Water Resources Control Bd., 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified, (Apr. 20, 2011).

12 Crowder v. Com. ex rel. State Corp. Commission, 197 Va. 96, 87 S.E.2d 745 (1955).

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§ 150. Patents and copyrights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

Copyrights and patents are subject to franchise and privilege taxes.[1] Thus, a state franchise tax based on the net income of a corporation is not void, so far as it imposes a tax based on royalties derived from copyrights, as taxing a federal instrumentality, where the statute does not explicitly provide for the inclusion of royalties in measuring the tax, such inclusion merely resulting from the application of the general language of the statute.[2] Moreover, a patented article may be taxed as tangible personal property at its full market value although its value is enhanced by reason of the patent.[3] Although a copyright is in the nature of a franchise granted by the government, it is not exercised in behalf of the government; thus, a tax upon the gains derived from the operations permitted by the copyright statute is not a tax upon the exertion of any governmental function.[4]

Footnotes

1 Educational Films Corporation of America v. Ward, 282 U.S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A.L.R. 1226 (1931).

2 Educational Films Corporation of America v. Ward, 282 U.S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A.L.R. 1226 (1931).

3 Thys v. State, 31 Wash. 2d 739, 199 P.2d 68 (1948).

4 Stone v. Stapling Machines Co., 221 Miss. 555, 73 So. 2d 123 (1954).

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§ 151. Indian lands and property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2273

Forms

Am. Jur. Pleading and Practice Forms, State and Local Taxation § 190 (Complaint, petition, or declaration—To recover state corporate income tax paid under protest—Tax precluded by federal statutory regulation of Native Americans on reservation)
Am. Jur. Pleading and Practice Forms, State and Local Taxation § 191 (Answer—State authorized to impose income tax on Native Americans on reservation—No interference with reservation self-government)

Although contrary authority obtains in the case of oil and mineral rights,[1] absent congressional consent, a State may not tax Indian reservation lands.[2]

Indian property on an Indian reservation is not subject to state taxation except by virtue of express authority conferred upon the State by Congress.[3] State or local governments have not been permitted to tax sales of cigarettes by Indians to Indians on the reservation,[4] mobile homes owned by Indians on an Indian reservation,[5] and sales of motor vehicles owned by members of an Indian tribe who live on tribal land, garage their cars principally on tribal land, and register their vehicles with the tribe.[6]

However, a State may tax the property of non-Indians which is located on Indian land.[7] In order to justify a state tax on non-Indian actors operating on Indian land, a State generally must be able to show that it seeks to assess the taxes in return for governmental functions that it performs for those on whom the taxes fall as a generalized interest in raising revenue is not sufficient to justify the state taxation in this context.[8] A State may require an Indian tribe to collect cigarette taxes from non-Indian purchasers of cigarettes at shops in the reservation and remit the tax collected to the state.[9] When determining

whether a State has authority to impose a nondiscriminatory tax on non-Indian lessees operating on Indian lands, a court must focus on: (1) the extent of the federal and tribal regulations governing the taxed activity; (2) whether the economic burden of the tax falls on the tribe or the non-Indian individual or entity; and (3) the extent of the state interest justifying the imposition of the taxes.[10]

Observation:

A state's general sales and cigarette excise taxes imposed upon on-reservation cigarette sales by Indians to non-Indians does not burden the commerce that would exist on the reservations without respect to the tax exemption, even if the result of the taxes is to lessen or eliminate tribal commerce with nonmembers, where that market exists in the first place only because of a claimed exemption from the taxes themselves.[11]

Absent congressional consent, a State may not tax Indian income from activities carried on within the boundaries of the reservation.[12] However, the general rule that a State may impose a tax upon a private contractor's proceeds from contracts with the federal government absent express congressional exemption applies to proceeds of a non-Indian contractor's highway improvement contract with the federal government even though it is performed on Indian reservations.[13]

Footnotes

1 Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721 (1949).
As to taxation of mineral rights, generally, see §§ 140 et seq.
Oil and gas lessees operating on Indian reservations are subject to nondiscriminatory state taxation so long as Congress has not acted to expressly or impliedly preempt such taxation. Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011), cert. denied, 2012 WL 538382 (U.S. 2012).

2 Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); State ex rel. Edmondson v. Native Wholesale Supply, 2010 OK 58, 237 P.3d 199 (Okla. 2010), cert. denied, 131 S. Ct. 2150, 179 L. Ed. 2d 935 (2011).

3 McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

4 Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).

5 Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976).

6 Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

7 Calpine Const. Finance Co. v. Arizona Dept. of Revenue, 221 Ariz. 244, 211 P.3d 1228 (Ct. App. Div. 1 2009).

8 Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011), cert. denied, 2012 WL 538382 (U.S. 2012).

9 California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 106 S. Ct. 289, 88 L. Ed. 2d 9 (1985).

10 Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011), cert. denied, 2012 WL 538382 (U.S. 2012).

11 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10, 29 Fed. R. Serv. 2d 743 (1980).

12 Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976).

13 Arizona Dept. of Revenue v. Blaze Const. Co., Inc., 526 U.S. 32, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999).

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§ 152. Grantees of Indian land

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2273

The interest of a non-Indian devisee in lands allotted to an Indian by a trust patent, for which no fee patent has been issued, is not exempt from state taxation.[1] The exemption from taxation granted by law is not personal to the Indian, whose restricted funds were used to purchase the land, but may be claimed by Indian grantees, devisees, or donees.[2]

Footnotes

1 Bailess v. Paukune, 344 U.S. 171, 73 S. Ct. 198, 97 L. Ed. 197 (1952).

2 Board of Com'rs of Creek County v. Seber, 318 U.S. 705, 63 S. Ct. 920, 87 L. Ed. 1094 (1943).

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§ 153. United States notes, bonds, and other obligations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

A.L.R. Library

Scope and application of term "other obligations" in Federal statute exempting stocks, bonds, Treasury notes and other obligations from taxation by or under state or municipal or local authority, 9 A.L.R.2d 521

Generally, absent congressional authorization, a State may not tax the obligations of the federal government,[1] and the type of credit instrumentalities which are exempt from state and local taxation under the constitutional doctrine of intergovernmental immunity are characterized by: (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specified dates, and (4) specific congressional authorization, which also pledges the full faith and credit of the United States in support of the promise to pay.[2]

Observation:

The intergovernmental tax immunity doctrine is based on the proposition that the borrowing power is an essential aspect of the federal government's authority, and just as the supremacy clause bars states from directly taxing federal property, it also bars states from taxing federal obligations in a manner which has an adverse effect on the United States' borrowing ability.[3]

However, the tax exemption for government obligations that is required by the Constitution is not a total exclusion but, instead, may be limited by charging obligations and their interest a fair share of related expenses or burdens.[4] The Borrowing and Supremacy Clauses of the United States Constitution do not prohibit the states from taxing personal property representing an interest in a federal instrumentality as long as the property interest is not taxed in a discriminatory manner when compared to similar investment property.[5] Interest earned on obligations of the United States may properly be included in the excise tax imposed on domestic insurance companies without violating the supremacy clause.[6] The fundamental issue in cases concerning the validity of state excise taxes under the supremacy clause is not whether the measuring base relies upon gross income or net income but whether the tax is a franchise tax or a property tax; if the subject of the tax is the corporate franchise, government obligations or the interest thereon may be included in the measure of the tax, but if the subject of the tax is the capital or the property of the corporation, the tax will be deemed an invalid tax on the government obligations.[7]

Additionally, under statute, all stocks and obligations of the United States government are exempt from taxation by a State or political subdivision of a State.[8] The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both to be considered in computing a tax,[9] except a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation.[10] A nonproperty excise tax on the privilege of operating a bank or savings association within the state is a franchise tax contemplated by the exception to the statute prohibiting taxation of United States obligations by the states.[11] Federal law does not preclude obligations of the United States from being included in the tax base for both a franchise tax and an excise tax even when a corporation is subject to both taxes.[12]

Observation:

Congress has legislatively foreclosed the states' ability to accomplish indirectly (through taxation of shares) what they could not achieve directly (taxing the value of federal obligations).[13]

Footnotes

1 Allfirst Bank v. Com., 593 Pa. 631, 933 A.2d 75 (2007).

2 Rockford Life Ins. Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 107 S. Ct. 2312, 96 L. Ed. 2d 152 (1987).

3 Rockford Life Ins. Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 107 S. Ct. 2312, 96 L. Ed. 2d 152 (1987).

4 First Nat. Bank of Atlanta v. Bartow County Bd. of Tax Assessors, 470 U.S. 583, 105 S. Ct. 1516, 84 L. Ed. 2d 535 (1985).

5 Matter of Protest of First Federal Sav. and Loan Ass'n of Claremore, 1987 OK 44, 743 P.2d 640 (Okla. 1987).

6 Commissioner of Revenue v. Massachusetts Mut. Life Ins. Co., 384 Mass. 607, 428 N.E.2d 297 (1981).

7 Commissioner of Revenue v. Massachusetts Mut. Life Ins. Co., 384 Mass. 607, 428 N.E.2d 297 (1981).

8 31 U.S.C.A. § 3124(a).
Statute as a restatement of the constitutional rule. Memphis Bank & Trust Co. v. Garner, 459 U.S. 392, 103 S. Ct. 692, 74 L. Ed. 2d 562 (1983).

9 31 U.S.C.A. § 3124(a).

[10] 31 U.S.C.A. § 3124(a)(1).

[11] Department of Revenue v. First Union Nat. Bank of Florida, 513 So. 2d 114 (Fla. 1987).

[12] First American Nat. Bank of Knoxville v. Olsen, 751 S.W.2d 417 (Tenn. 1987).

[13] Allfirst Bank v. Com., 593 Pa. 631, 933 A.2d 75 (2007).

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§ 154. Federal corporations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

The Constitution's silence on the subject of the state power to tax corporations chartered by Congress does not imply that the states have a reserved power to tax such federal instrumentalities.[1]

Legislation exempting from state taxation securities issued by agencies of the United States, and the interest thereon, is constitutional. As against the contention that Congress could not constitutionally immunize the lending functions, or activities incidental thereto, of federal land banks from state taxation, because of the allegedly proprietary rather than governmental character of such functions, the Supreme Court of the United States has said that any constitutional exercise of the federal government's delegated powers is governmental so that "when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental," and "Congress has power to protect the instrumentalities which it has constitutionally created" by prescribing tax immunity for their activities.[2]

Where governmental credit agencies have been afforded immunity from state taxation by virtue of the fact that they promote and carry out governmental functions and policies, the right of a State to impose a tax as a privilege tax to be paid as a condition precedent to state personal property taxes on property acquired by the bank on mortgage foreclosure has been denied.[3]

Footnotes

1 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

2 Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S. Ct. 1, 86 L. Ed. 65 (1941).

[3] Federal Land Bank of Wichita v. Board of County Com'rs of Kiowa County, State of Kan., 368 U.S. 146, 82 S. Ct. 282, 7 L. Ed. 2d 199 (1961).

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§ 155. State corporations holding franchise from federal government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2006, 2064, 2089

Each production credit association and its obligations are instrumentalities of the United States, and as such, any and all notes, debentures, and other obligations issued by such associations will be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any state, territorial, or local taxing authority except that interest on such obligations will be subject to federal income taxation in the hands of the holder.[1] The state tax immunity that a production credit association (PCA)—a corporation chartered by the Farm Credit Administration—has, under statute, is a permitted consequence of the PCA's status as a federal instrumentality.[2]

Footnotes

[1] 12 U.S.C.A. § 2077.

[2] Arkansas v. Farm Credit Services of Cent. Arkansas, 520 U.S. 821, 117 S. Ct. 1776, 138 L. Ed. 2d 34 (1997), referring to 12 U.S.C.A. § 2077.

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§ 156. National banks

Topic Summary | Correlation Table | References

West's Key Number Digest

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Absent congressional authorization, a State may not tax a national bank.[1] However, federal law no longer limits the ability of states to tax national banks directly,[2] and under statute, for the purposes of any tax law enacted under authority of the United States or any state, a national bank must be treated as a bank organized and existing under the laws of the state or other jurisdiction within which its principal office is located.[3] Tax rate parity between national and state banking institutions is a prerequisite for any tax upon national banks.[4] A State may collect a franchise tax on national banking associations or banks incorporated under the laws of other jurisdictions even though it does not possess the power to grant such corporations the license "to exist" in the state.[5]

Observation:

The purpose of the 1969 permanent amendment of the federal statute concerning state taxation of national banks was to remove the immunity from state taxation previously granted national banks, thereby allowing the states to treat, for tax purposes, such banks as state banks[6] and thereby to promote equality in state taxation of banks vis-a-vis national banks and banks vis-a-vis nonbank corporations.[7]

The reserve banks are deemed to be federal instrumentalities for purposes of immunity from state taxation.[8] However, areas, which are within a federal reserve bank's building and which are devoted to subtreasury functions, are not immune from real estate taxation.[9]

Federal home loan banks are “federal instrumentalities,” entitled to certain tax immunities.[10] Similarly, a federal credit union constitutes an instrumentality of the United States which is exempt from federal, as well as state, territorial, or local, taxation.[11] Finally, a federally chartered savings and loan association is an instrumentality of the federal government and is immune from state taxation in the absence of congressional authorization.[12]

Footnotes

1 Allfirst Bank v. Com., 593 Pa. 631, 933 A.2d 75 (2007).

2 Allfirst Bank v. Com., 593 Pa. 631, 933 A.2d 75 (2007).

3 12 U.S.C.A. § 548.

4 Western States Bankcard Assn. v. City and County of San Francisco, 19 Cal. 3d 208, 137 Cal. Rptr. 183, 561 P.2d 273 (1977).

5 Bankers Trust New York Corp. v. Department of Finance of City of New York, 79 N.Y.2d 457, 583 N.Y.S.2d 821, 593 N.E.2d 275 (1992).

6 Lake County Nat. Bank of Painesville v. Kosydar, 36 Ohio St. 2d 189, 65 Ohio Op. 2d 404, 305 N.E.2d 799 (1973).

7 U.S. v. State Bd. of Equalization, 639 F.2d 458 (9th Cir. 1980).

8 Lewis v. U.S., 680 F.2d 1239 (9th Cir. 1982).
As to federal instrumentalities, generally, see § 144.

9 Federal Reserve Bank of Minneapolis v. State, 313 N.W.2d 619 (Minn. 1981).

10 Association of Data Processing Service Organizations, Inc. v. Federal Home Loan Bank Bd., 568 F.2d 478 (6th Cir. 1977).

11 TI Federal Credit Union v. DelBonis, 72 F.3d 921, 106 Ed. Law Rep. 33 (1st Cir. 1995); U.S. v. State of Mich., 851 F.2d 803 (6th Cir. 1988).

12 First Federal Sav. and Loan Ass’n of Boston v. State Tax Commission, 372 Mass. 478, 363 N.E.2d 474 (1977), judgment aff’d, 437 U.S. 255, 98 S. Ct. 2333, 57 L. Ed. 2d 187 (1978).

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XI. Interstate and Foreign Commerce

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West's Key Number Digest

West's Key Number Digest, Commerce 62.71, 62.75, 63.5, 72, 73, 74.20, 77.15(1), 77.15(2)

West's Key Number Digest, Taxation 2214, 2215

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West's A.L.R. Digest, Taxation 2214, 2215

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XI. Interstate and Foreign Commerce

§ 157. Constitutional restrictions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.71

A.L.R. Library

Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate commerce as regards local taxation, 10 A.L.R.2d 651

Under the Commerce Clause, the Federal Constitution specifically grants Congress the power to regulate commerce among the several states.[1] The "Dormant Commerce Clause" is the implicit corollary that if Congress is to regulate commerce between the states and with foreign nations, then state governments may not impose taxes or other conditions that will impede the free flow of trade between states.[2] The negative, or dormant, Commerce Clause prohibits certain state taxation even when Congress has failed to legislate on the subject.[3]

Observation:

The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.[4] States are prevented from retreating into economic isolation or jeopardizing the welfare of the nation as a whole as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.[5]

The Commerce Clause operates to limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.[6] The Commerce Clause responds principally to state taxes impeding free private trade in the national marketplace,[7] and a State may not tax value earned outside its borders.[8] Disparate tax treatment based on an affiliated group's geographic location and corporate structure constitutes an impermissible burden on interstate commerce.[9] Additionally, local taxing authorities, like states, are subject to the negative Commerce Clause.[10]

The Dormant Commerce Clause does not, however, "immunize" interstate commerce and its instrumentalities from state taxation,[11] and state taxes levied on interstate commerce are not per se invalid.[12] The states may tax interstate commerce because the Commerce Clause does not exempt it from its fair share of state taxes.[13] It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burdens.[14] Thus, the Commerce Clause is protection against multiple or discriminatory taxation, not a means of escaping all taxation.[15] A State has a significant interest in exacting from interstate commerce its fair share of the cost of state government,[16] and interstate commerce may be made to pay its own way.[17] A state tax does not violate the dormant Commerce Clause or will be sustained against the Commerce Clause when: (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the State.[18] A state taxing statute need only fail one prong of the test for constitutionality against the Commerce Clause and a due process challenge in order to be held invalid.[19]

CUMULATIVE SUPPLEMENT

Cases:

The basic principles of the Supreme Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws. U.S.C.A. Const. Art. 1, § 8, cl. 3. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

Although the Commerce Clause is framed as a positive grant of power to Congress, its language contains a further, negative command, known as the "dormant Commerce Clause," prohibiting certain state taxation even when Congress has failed to legislate on the subject. U.S.C.A. Const. Art. 1, § 8, cl. 3. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

In determining whether a state tax statute violated the dormant Commerce Clause, courts must consider not the formal language of the tax statute but rather its practical effect. U.S.C.A. Const. Art. 1, § 8, cl. 3. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

Typically, when a federal statute is construed to invalidate a state tax, a court applies the rational basis test to determine whether Congress had a rational basis for finding the tax interfered with interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3. Montgomery County Com'n v. Federal Housing Finance Agency, 776 F.3d 1247 (11th Cir. 2015).

A tax satisfying the Due Process Clause or the Commerce Clause does not necessarily satisfy the other Clause because they reflect different constitutional concerns. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 14. In re Appeals of Various Applicants from a Decision of Division of Property Valuation of State for Tax Year 2009 Pursuant to K.S.A. 74-2438, 313 P.3d 789 (Kan. 2013).

Review of commerce clause challenges to State taxes focuses on the practical effect of a challenged tax. U.S.C.A. Const. Art. 1, § 8. Regency Transp., Inc. v. Commissioner of Revenue, 42 N.E.3d 1133 (Mass. 2016).

Under the dormant Commerce Clause, a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state, nor may a state impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation. U.S.C.A. Const. Art. 1, § 8, cl. 3. DIRECTV v. Utah State Tax Com'n, 2015 UT 93, 364 P.3d 1036 (Utah

2015).

[END OF SUPPLEMENT]

Footnotes

1 Galland Henning Nopak, Inc. v. Combs, 317 S.W.3d 841 (Tex. App. Amarillo 2010).
As to impact of the Commerce Clause on the taxation by states of foreign corporations, see §§ 193 et seq.

2 DIRECTV, Inc. v. Levin, 181 Ohio App. 3d 92, 2009-Ohio-636, 907 N.E.2d 1242 (10th Dist. Franklin County 2009), judgment aff'd, 128 Ohio St. 3d 68, 2010-Ohio-6279, 941 N.E.2d 1187 (2010), petition for cert. filed, 79 U.S.L.W. 3636, 80 U.S.L.W. 3016 (U.S. Apr. 27, 2011).

3 Frey v. Comptroller of Treasury, 422 Md. 111, 29 A.3d 475 (2011), petition for cert. filed, 80 U.S.L.W. 3431 (U.S. Mar. 26, 2012).

4 Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).

5 Pfizer Inc. v. Lancaster County Bd. of Equalization, 260 Neb. 265, 616 N.W.2d 326 (2000).

6 Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 81 A.D.3d 183, 913 N.Y.S.2d 129 (1st Dep't 2010).

7 Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980).

8 Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

9 General Motors Corp. v. Director of Revenue, 981 S.W.2d 561 (Mo. 1998).

10 General Motors Corp. v. City and County of Denver, 990 P.2d 59 (Colo. 1999).

11 General Motors Corp. v. City and County of Denver, 990 P.2d 59 (Colo. 1999).

12 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981); President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Com'n, 13 S.W.3d 635 (Mo. 2000).

13 Lamtec Corp. v. Department of Revenue, 170 Wash. 2d 838, 246 P.3d 788 (2011), cert. denied, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011).

14 Frey v. Comptroller of Treasury, 422 Md. 111, 29 A.3d 475 (2011), cert. denied, 2012 WL 986857 (U.S. 2012).

15 M & T Charters, Inc. v. Commissioner of Revenue, 404 Mass. 137, 533 N.E.2d 1359 (1989).

16 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).
In order to avoid violating the Commerce Clause, a state tax need not be limited to the cost of the services incurred by the State on account of a particular activity; interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct benefit. Ammex, Inc. v. Department of Treasury, 273 Mich. App. 623, 732 N.W.2d 116 (2007).

17 Franks & Son, Inc. v. State, 136 Wash. 2d 737, 966 P.2d 1232 (1998).

18 Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995); Directv, Inc. v. Treesh, 487 F.3d 471, 51 A.L.R.6th 605 (6th Cir. 2007); Irwin Indus. Tool Co. v. Illinois Dept. of Revenue, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010); Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011); Travelscape, LLC v. South Carolina Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011);

Lamtec Corp. v. Department of Revenue, 170 Wash. 2d 838, 246 P.3d 788 (2011), cert. denied, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011).
As to discrimination, generally, see §§ 168, 169.
As to apportionment based on income, see § 166.

19 Marx v. Truck Renting and Leasing Ass'n Inc., 520 So. 2d 1333 (Miss. 1987).

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Part Three. Subjects of Taxation

XI. Interstate and Foreign Commerce

§ 158. Constitutional restrictions—Substantial nexus requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.71

A nondomiciliary jurisdiction may constitutionally tax property when that property has a substantial nexus with that jurisdiction.[1] The Commerce Clause prohibits states from imposing tax obligations on an out-of-state business unless it has a "substantial nexus" with the taxing state,[2] that is, a definitive link, some minimum connection, between the State and the person or business activities that it seeks to tax.[3] However, there must be a connection to the activity itself rather than a connection only to the actors that the State seeks to tax,[4] and it has been held that a substantial nexus requires a finding of a physical presence in the taxing state.[5] The inquiry must focus on underlying activities conducted within the state, and in order for a taxpayer to avoid such taxation, it must show that the income was derived from activities unrelated to activities conducted within the taxing state.[6] The slightest presence of an out-of-state business is not sufficient to establish a substantial nexus with the taxing state.[7]

Distinction:

A State's ability to tax a nonresident entity is limited by the Commerce Clause and principles of due process.[8] However, the Commerce and Due Process Clauses impose distinct but parallel limitations on a State's power to tax out-of-state activities.[9] Both the Due Process and Commerce Clauses require a definite link, or minimum connection, between a State and the person, property, or transaction that it seeks to tax.[10] Consistent with the due process clause, a State may have the authority to impose a tax based on minimum contacts, but the imposition of such a tax may still unconstitutionally burden interstate commerce because the taxpayer lacks a substantial nexus with the taxing state.[11] The "substantial nexus" requirement imposed by the Commerce Clause on a State's ability to tax an out-of-state entity is not, like the "minimum contacts" requirement imposed by the Due Process Clause, a proxy for notice but rather a means for limiting state burdens on interstate commerce.[12]

The dormant Commerce Clause demands a fair relation between the tax and the benefits conferred upon the taxpayer by the State.[13] In determining whether a state tax bearing on interstate commerce is fairly related to the presence and activities of a taxpayer within the state, the focus is on the wide range of benefits provided to the taxpayer[14] and is not on what specific services are utilized by the taxpayers in its day-to-day operations.[15] The relevant inquiry, when determining whether a state tax is fairly related to services provided by the State for purposes of the Commerce Clause, is not the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs that the State incurs on account of the taxpayer's activities but whether the tax is reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction.[16] The controlling question is whether the State has given anything for which it can ask return.[17] A taxpayer's receipt of police and fire protection, use of public roads, and other advantages of civilized society satisfies the Commerce Clause requirement that the tax be fairly related to benefits provided by the State to the taxpayer.[18] A substantial nexus is established when the taxpayer avails itself of the substantial privilege of carrying on business in the taxing jurisdiction,[19] and the fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.[20]

The purpose of the requirement under the Dormant Commerce Clause that a state tax be fairly related to services provided by the State is to ensure that a state's tax burden is not placed upon persons who do not benefit from the state's services.[21] When the measure of a tax bears no relationship to the taxpayer's presence or activities in a state, a court may properly conclude that the State is imposing an undue burden on interstate commerce.[22]

CUMULATIVE SUPPLEMENT

Cases:

The requirement that a state tax on interstate commerce must apply to an activity with a substantial nexus with the taxing State is established when the taxpayer or collector avails itself of the substantial privilege of carrying on business in that jurisdiction. U.S.C.A. Const. Art. 1, § 8, cl. 3. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

While a State may, consistent with the Due Process Clause of the Fourteenth Amendment, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 14. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

The fact that a State has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

The Due Process Clause centrally concerns the fundamental fairness of governmental activity, but the Commerce Clause and its taxation nexus requirement are informed, not so much by concerns about fairness for the individual defendant, as by structural concerns about the effects of state regulation on the national economy. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 14. In re Appeals of Various Applicants from a Decision of Division of Property Valuation of State for Tax Year 2009 Pursuant to K.S.A. 74-2438, 313 P.3d 789 (Kan. 2013).

Taxation satisfies the Commerce Clause by passing a four-part test, requiring that the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. U.S.C.A. Const. Art. 1, § 8, cl. 3. Gore Enterprise Holdings, Inc. v. Comptroller of Treasury, 437 Md. 492, 87 A.3d 1263 (2014).

[END OF SUPPLEMENT]

Footnotes

1 Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 129 S. Ct. 2277, 174 L. Ed. 2d 1 (2009).

2 MBNA America Bank, N.A. & Affiliates v. Indiana Dept. of State Revenue, 895 N.E.2d 140 (Ind. Tax Ct. 2008).
Commerce Clause bars states from levying taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation. MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008).

3 Classics Chicago, Inc. v. Comptroller of Treasury, 189 Md. App. 695, 985 A.2d 593 (2010); Ammex, Inc. v. Department of Treasury, 273 Mich. App. 623, 732 N.W.2d 116 (2007).

4 Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992).

5 In re Appeal of Intercard, Inc., 270 Kan. 346, 14 P.3d 1111 (2000).
To the extent there is a physical presence requirement to establish that a foreign entity has substantial nexus with the taxing state, for the purposes of determining whether the tax violates the Commerce Clause, it can be satisfied by the presence of the foreign entity's activities within the state; it does not require a "presence" in the sense of having a brick and mortar address within the state. Lamtec Corp. v. Department of Revenue, 170 Wash. 2d 838, 246 P.3d 788 (2011), cert. denied, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011).

6 Mississippi State Tax Com'n v. Bates, 567 So. 2d 190 (Miss. 1990).

7 In re Appeal of Intercard, Inc., 270 Kan. 346, 14 P.3d 1111 (2000).

8 Classics Chicago, Inc. v. Comptroller of Treasury, 189 Md. App. 695, 985 A.2d 593 (2010).

9 MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008).

10 Irwin Indus. Tool Co. v. Illinois Dept. of Revenue, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).

11 Capital One Bank v. Commissioner of Revenue, 453 Mass. 1, 899 N.E.2d 76 (2009).
An income-based tax may be consistent with due process and yet unduly burden interstate commerce; the nexus required for due process is merely the purposeful direction of activities to the state, whereas the Commerce Clause requires more of a connection. Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

12 Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

13 Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995).
The measure of a state tax must be reasonably related to the taxpayer's presence or activities in the taxing state. Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 216 Ill. Dec. 537, 665 N.E.2d 795 (1996); Pfizer Inc. v. Lancaster County Bd. of Equalization, 260 Neb. 265, 616 N.W.2d 326 (2000).

14 Goldberg v. Sweet, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989).

15 Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 701 N.E.2d 961 (1998).

16 In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax Years 1998, 1999, and 2000, 2008 OK 94, 234 P.3d 938 (Okla. 2008), cert. denied, 130 S. Ct. 1685, 176 L. Ed. 2d 179 (2010).

17 MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008).

18 Cities Service Gas Co. v. Oklahoma Tax Com'n, 1989 OK 69, 774 P.2d 468 (Okla. 1989); Hartley Marine Corp. v. Mierke, 196 W. Va. 669, 474 S.E.2d 599 (1996).

[19] Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 129 S. Ct. 2277, 174 L. Ed. 2d 1 (2009); Fluor Enterprises, Inc. v. Revenue Div., Dept. of Treasury, 477 Mich. 170, 730 N.W.2d 722 (2007); Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

[20] Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

[21] General Motors Corp. v. City and County of Denver, 990 P.2d 59 (Colo. 1999).

[22] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981); Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 701 N.E.2d 961 (1998).

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Part Three. Subjects of Taxation

XI. Interstate and Foreign Commerce

§ 159. Constitutional restrictions—Import-Export Clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 77.15(1)

Although duties and imposts are indisputably taxes, the import-export clause permits states to impose generally applicable, nondiscriminatory taxes even if those taxes fall on imports or exports.[1] While the Constitution's export clause has been interpreted as allowing no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit, the import-export clause has been interpreted as permitting states to impose nondiscriminatory taxes on imports or exports.[2] The export-import clause forbidding states to lay duties on imports or exports does not require a blanket tax immunity for any business that buys or manufactures goods for shipment overseas; the clause allows states to impose sufficient taxes to defray the expenses of providing local services to importers and exporters of goods.[3] Where a State seeks to tax the instrumentalities of foreign commerce, the state tax must pass the same test as that which is used to evaluate laws affecting interstate commerce.[4] The threshold inquiry in a Foreign Commerce Clause analysis of a state tax that must be made is whether the tax at issue actually implicates foreign commerce; the taxpayer has the burden of showing by clear and cogent evidence that the state tax results in extraterritorial values being taxed.[5] The purpose of the Foreign Commerce Clause is to protect markets and participants in markets, not taxpayers as such; it is not the purpose of the Foreign Commerce Clause to protect state residents from their own state taxes.[6]

CUMULATIVE SUPPLEMENT

Cases:

County's business, professional, and occupational license (BPOL) tax, as applied to duty-free retailer's gross receipts of its international export sales, violated import and export clause of federal Constitution, since merchandise sold by retailer to international travelers constituted export goods in transit, and tax was direct tax on export goods in transit in its operation and effect, despite being imposed on gross receipts, in that tax was imposed on percentage of gross sales. U.S. Const. art. 1, § 10, cl. 2; Va. Code Ann. § 58.1-3702. Dulles Duty Free, LLC v. County of Loudoun, 803 S.E.2d 54 (Va. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Auto Cargo, Inc. v. Miami Dade County, 237 F.3d 1289 (11th Cir. 2001).

2 Auto Cargo, Inc. v. Miami Dade County, 237 F.3d 1289 (11th Cir. 2001).

3 Coast Pacific Trading, Inc. v. State, Dept. of Revenue, 105 Wash. 2d 912, 719 P.2d 541 (1986).

4 In re Barton-Dobenin, 269 Kan. 851, 9 P.3d 9 (2000).

5 In re Barton-Dobenin, 269 Kan. 851, 9 P.3d 9 (2000).

6 In re Barton-Dobenin, 269 Kan. 851, 9 P.3d 9 (2000).

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Part Three. Subjects of Taxation

XI. Interstate and Foreign Commerce

§ 160. Property destined for, or in course of, removal from state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 77.15(2)

A.L.R. Library

Property destined for, or in course of, removal from state as subject to taxation therein, 11 A.L.R.2d 938

Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate commerce as regards local taxation, 10 A.L.R.2d 651

Goods that have not yet entered the stream of interstate commerce are part of the general mass of property in a state and are subject to state taxation.[1] For goods to be in interstate commerce, and thus exempt from state taxation under the dormant Commerce Clause, it must appear that the movement for another state has actually begun and is going on.[2] Not every preliminary movement of goods toward eventual exportation is sufficient to invoke the protection of the import-export clause.[3] The mere intention to send goods out-of-state does not place them in interstate commerce nor does preparatory gathering for that purpose at a depot or entrepot.[4] Earmarking products for transportation on a certain day with a common carrier is not the same as actually delivering the products to the common carrier for transportation so as to make the products part of the stream of interstate commerce and exempt from state taxation under the dormant Commerce Clause.[5]

Observation:

Although insistence on a physical entry into the stream of exportation to secure protection of the import-export clause from local taxation may be subject to argument that it represents an overly wooden or mechanistic approach, the area is one in which a matter of certainty is required since it is highly important, both to a shipper and to the state, that it should be clearly defined so as to avoid

all ambiguity or question.[6]

Use of a common carrier to carry goods from one resting place to another within the same state is insufficient to commence the exportation process and immunize the goods from nondiscriminatory local taxation.[7]

Footnotes

1 Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W.3d 335 (Tex. App. Houston 1st Dist. 2007).

2 Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W.3d 335 (Tex. App. Houston 1st Dist. 2007).

3 Kosydar v. National Cash Register Co., 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1974).

4 Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W.3d 335 (Tex. App. Houston 1st Dist. 2007).

5 Marathon Ashland Petroleum L.L.C. v. Galveston Cent. Appraisal Dist., 236 S.W.3d 335 (Tex. App. Houston 1st Dist. 2007).

6 Kosydar v. National Cash Register Co., 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1974).

7 Connell Rice & Sugar Co., Inc. v. Yolo County, 569 F.2d 514 (9th Cir. 1978); Farmers' Rice Cooperative v. County of Yolo, 14 Cal. 3d 616, 122 Cal. Rptr. 65, 536 P.2d 465 (1975).

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XI. Interstate and Foreign Commerce

§ 161. Necessity that there be a transit in interstate or foreign commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 72

A.L.R. Library

Property destined for, or in course of, removal from state as subject to taxation therein, 11 A.L.R.2d 938

Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate commerce as regards local taxation, 10 A.L.R.2d 651

The nexus requirement for a state tax under the Commerce Clause ensures that, with respect to goods in interstate commerce, a State will not be able to exact a fee simply for the privilege of passing through the state.[1] Goods in interstate transit are not subject to local taxation.[2] Assessment of even nondiscriminatory property taxes on goods which are merely in transit through a state when a tax is assessed is prohibited.[3]

A State may not tax goods which have entered the stream of foreign commerce[4] or are in export transit.[5] Such immunity from state taxation is absolute[6] and occurs when goods have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.[7]

Practice Tip:

The test applied to ascertain and determine whether goods have entered foreign commerce and, thus, may not be taxed by a State is one of reasonable facility and certainty; there must be "actual movement" of the goods to remove them from the ambit of state taxation.[8]

Footnotes

[1] In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax Years 1998, 1999, and 2000, 2008 OK 94, 234 P.3d 938 (Okla. 2008), cert. denied, 130 S. Ct. 1685, 176 L. Ed. 2d 179 (2010).

[2] Calvert v. Zanes-Ewalt Warehouse, Inc., 502 S.W.2d 689 (Tex. 1973).

[3] Michelin Tire Corp. v. Wages, 423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976); Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So. 2d 884, 2 A.L.R.4th 421 (Fla. Dist. Ct. App. 2d Dist. 1979).

[4] Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995); City of Tacoma v. General Metals of Tacoma, Inc., 84 Wash. 2d 560, 527 P.2d 1314 (1974).

[5] U.S. v. International Business Machines Corp., 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996).

[6] Farmers' Rice Cooperative v. County of Yolo, 14 Cal. 3d 616, 122 Cal. Rptr. 65, 536 P.2d 465 (1975).

[7] Virginia Indonesia Co. v. Harris County Appraisal Dist., 910 S.W.2d 905 (Tex. 1995).

[8] City of Tacoma v. General Metals of Tacoma, Inc., 84 Wash. 2d 560, 527 P.2d 1314 (1974).

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State and Local Taxation
John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Alan J. Jacobs, J.D., Sonja Larsen, J.D., Jack K. Levin, J.D., Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc., Jeffrey J. Shampo, J.D., and Eric C. Surette, J.D.

Part Three. Subjects of Taxation

XI. Interstate and Foreign Commerce

§ 162. Termination of transit

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 72

West's Key Number Digest, Taxation 2214, 2215

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Loading or unloading interstate freight in performance of obligation resting upon one other than interstate carrier as interstate commerce as regards local taxation, 10 A.L.R.2d 651

State tax on or in respect of goods shipped in interstate commerce to consignee for sale on consignor's account without previous sale or order for purchase, 4 A.L.R.2d 244

Generally, goods transported in interstate commerce are not taxable until they leave interstate commerce.[1] Nonetheless, once goods have been placed in transit in interstate commerce, when there is a break in interstate transit, property may come to rest within a state and become subject to the power of the State to impose a nondiscriminatory property tax.[2] In determining whether goods are exempt from ad valorem state taxation under the Commerce Clause, it is not what happens to the goods or where they finally go that is controlling but rather the purpose and occasion for interruption of their movement and the ability to interrupt which is controlling.[3] If the purpose of the interruption is incidental to transportation, it is not taxable.[4] When the stoppage of property in interstate commerce is necessary for the safety and convenience of the goods, the continuity of transit is not considered broken so as to subject the goods to state taxation where they have come to rest.[5] However, if the stoppage of property in interstate commerce is attributable to the business purpose of the owner, then the continuity of transit is deemed terminated, and the goods are subject to tax in the jurisdiction of the stoppage.[6]

Observation:

In determining whether there is continuity of transit, so as to maintain immunity from state taxation for goods placed in interstate transit which have come to rest within a state, courts must look at the facts of each case and consider the owner's intention, the owner's ability to change destination, the agency or method of transportation, the actual continuity of the journey, and the purpose of the interruption.[7]

An article transported in interstate commerce that has arrived at a destination within the state and is held there for use or disposal passes under the protection of state law and becomes subject to the taxing and police power of the State.[8]

Footnotes

1 American Steamship Co. v. Limbach, 61 Ohio St. 3d 22, 572 N.E.2d 629 (1991).

2 Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App. Texarkana 2008), review denied, (2 pets.) (Mar. 12, 2010) and cert. denied, 131 S. Ct. 2097, 179 L. Ed. 2d 891 (2011).

3 Pan Am. World Airways, Inc. v. Morgan, 82 Wash. 2d 706, 513 P.2d 278 (1973).

4 Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 368 So. 2d 884, 2 A.L.R.4th 421 (Fla. Dist. Ct. App. 2d Dist. 1979).

5 Midland Cent. Appraisal Dist. v. BP America Production Co., 282 S.W.3d 215 (Tex. App. Eastland 2009), review denied, (Mar. 12, 2010) and cert. denied, 131 S. Ct. 2097, 179 L. Ed. 2d 891 (2011).

6 Midland Cent. Appraisal Dist. v. BP America Production Co., 282 S.W.3d 215 (Tex. App. Eastland 2009), review denied, (Mar. 12, 2010) and cert. denied, 131 S. Ct. 2097, 179 L. Ed. 2d 891 (2011).

7 Peoples Gas, Light, and Coke Co. v. Harrison Cent. Appraisal Dist., 270 S.W.3d 208 (Tex. App. Texarkana 2008), review denied, (2 pets.) (Mar. 12, 2010) and cert. denied, 131 S. Ct. 2097, 179 L. Ed. 2d 891 (2011).

8 Liberty Steel Co. v. Oklahoma Tax Commission, 1976 OK 83, 554 P.2d 8 (Okla. 1976).

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XI. Interstate and Foreign Commerce

§ 163. Property used or employed in commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 73

The fact that property is used or employed in interstate or foreign commerce does not of itself render it immune or exempt from nondiscriminatory local taxation,[1] and a State may levy a tax on property engaged in interstate commerce when that property is within the taxing state,[2] and such power can be exercised in the absence of a constitutional prohibition or congressional preemption.[3] Ad valorem taxation of instrumentalities of commerce does not burden that commerce in violation of the Commerce Clause.[4]

Interstate commerce property may have a tax situs in more than one state; each state in which it has a tax situs is allowed to tax the property so long as it does so on a reasonably apportioned basis as required by the interstate Commerce Clause.[5] A nondiscriminatory ad valorem tax based upon the proportionate use of rolling stock in a taxing state is valid despite the contention that such a tax imposes an unconstitutional burden upon interstate commerce.[6] Additionally, ad valorem tax statutes satisfied the requirements of the Due Process Clause and Commerce Clause of the United States Constitution that a tax be apportioned if a vehicle has acquired a tax situs in another state, though the statutes did not specifically provide a formula for apportionment, where a statutory procedure existed for challenging the valuation placed on the motor vehicle for ad valorem tax purposes.[7]

Footnotes

1 Norfolk & W. Ry. Co. v. Missouri State Tax Commission, 390 U.S. 317, 88 S. Ct. 995, 19 L. Ed. 2d 1201 (1968); Young & Co. of Houston v. Calvert, 405 S.W.2d 174 (Tex. Civ. App. Austin 1966), writ refused, (Oct. 12, 1966).

2 U.S. Transmission Systems, Inc. v. Board of Assessment Appeals of State of Colo., 715 P.2d 1249 (Colo. 1986).

3 Tenneco Inc. v. Public Service Commission of West Virginia, 489 F.2d 334 (4th Cir. 1973).

4 Peabody Coal Co. v. State Tax Com'n, 731 S.W.2d 837 (Mo. 1987).

5 Magic II, Inc. v. Dubno, 206 Conn. 253, 537 A.2d 998 (1988); Beelman Truck Co. v. Ste. Genevieve County Bd. of Equalization, 861 S.W.2d 557 (Mo. 1993), as modified on denial of reh'g, (Sept. 29, 1993).

6 Anderson Trucking Service, Inc. v. Tax Division, Arkansas Public Service Commission, 261 Ark. 69, 546 S.W.2d 430 (1977).

7 East West Exp., Inc. v. Collins, 264 Ga. 774, 449 S.E.2d 599 (1994).

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XI. Interstate and Foreign Commerce

§ 164. Taxation of business or privilege of engaging in interstate or foreign commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.75

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Comment Note.—Validity, under Federal Constitution, of state tax on, or measured by, income of foreign corporation, 67 A.L.R.2d 1322

In the process of competition, no State may discriminatorily tax products manufactured or business operations performed in any other state.[1] As a consequence of the constitutional restriction on state taxing powers imposed by the Commerce Clause of the Federal Constitution, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state.[2] However, a business operating in interstate commerce is not immune from state taxation.[3] As to the taxation of a unitary business, the United States Constitution requires that a State not tax a unitary business unless at least some part of it is conducted in state, there must be some bond of ownership or control uniting the business, and the out-of-state activities of the business must be related in some concrete way to the in-state activities.[4]

Footnotes

1 Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977).

2 American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987).

3 Tennessee Gas Pipeline Co. v. Marx, 594 So. 2d 615 (Miss. 1992).

4 Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation, 100 N.J. 1, 494 A.2d 775 (1985).

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XI. Interstate and Foreign Commerce

§ 165. Intrastate business

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.71

The Federal Constitution's Commerce Clause poses no bar to local taxation of purely intrastate transactions which are not components of interstate commerce[1] although a state tax or regulation affecting interstate commerce is not immune from Commerce Clause scrutiny because it attaches only to a "local" or intrastate activity.[2] A State may also, under appropriate conditions, tax intrastate activity even though the activity is part of interstate commerce.[3] However, a tax on a person involved in both wholly intrastate and interstate commerce with in-state aspects must be tailored so as to attach primarily to revenue derived from the in-state activities.[4]

A tax that burdens interstate commerce and favors local interests can be upheld as compensatory only if the taxing jurisdiction identifies a specific intrastate tax responsibility for which it is attempting to compensate, shows that events on which the interstate and intrastate taxes are based are substantially equivalent in that they are sufficiently similar in substance to serve as mutually exclusive proxies for each other, and demonstrates that the tax on interstate commerce roughly approximates and does not exceed the amount of intrastate tax.[5]

Footnotes

1 Douglas v. Glacier State Tel. Co., 615 P.2d 580 (Alaska 1980).

2 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).

3 United Parcel Service, Inc. v. State, Dept. of Revenue, 102 Wash. 2d 355, 687 P.2d 186 (1984).

4 Western Maryland Ry. Co. v. Goodwin, 167 W. Va. 804, 282 S.E.2d 240 (1981).

5 Homier Distributing Co., Inc. v. City of Albany, 90 N.Y.2d 153, 659 N.Y.S.2d 223, 681 N.E.2d 390 (1997).

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XI. Interstate and Foreign Commerce

§ 166. Income or receipts from commerce as subject or measure of tax

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 74.20

A.L.R. Library

Comment Note.—Validity, under Federal Constitution, of state tax on, or measured by, income of foreign corporation, 67 A.L.R.2d 1322

Forms

Am. Jur. Pleading and Practice Forms, State and Local Taxation § 188 (Complaint, petition or declaration—To recover state corporate income tax paid under protest by foreign corporation—Tax prohibited by federal statute as undue burden on interstate commerce)
Am. Jur. Pleading and Practice Forms, State and Local Taxation § 189 (Answer—Foreign corporation's activities within state are beyond protection of federal statute—Sales representatives not independent contractors)

To avoid violating Commerce Clause principles, a state tax imposed on, or measured by, gross receipts from interstate and foreign commerce must be apportioned to reflect only that business attributable to intrastate commerce[1] to avoid cumulative taxation.[2] The inquiry into whether the tax is fairly apportioned for purposes of a Commerce Clause challenge must take into account the location where the revenue is generated.[3] However, the fact that a business and occupations tax formula resulted in the taxation of some income which did not have its source within the taxing state did not render it "out of all proportion" under due process analysis; rather, the tax was sufficiently tied to the privilege of doing business within the state to meet due

process requirements.[4] A tax levied on gross receipts from the sales of tangible personal property in another state is an impermissible burden on commerce.[5]

Footnotes

1 Polychrome Intern. Corp. v. Krigger, 5 F.3d 1522 (3d Cir. 1993).

2 Public Utility Dist. No. 2 of Grant County v. State, 82 Wash. 2d 232, 510 P.2d 206 (1973).

3 General Motors Corp. v. City and County of Denver, 990 P.2d 59 (Colo. 1999).
Wholesalers' tax, as applied to the proceeds of an out-of-state automobile manufacturer's wholesaling sales in which title to the product passed outside Delaware before being physically delivered to dealers in Delaware, was fairly apportioned and did not discriminate against interstate commerce in violation of the negative or dormant aspect of the Commerce Clause, as the dealer was the purchaser and physical delivery to the dealer occurred only in Delaware, and only Delaware had jurisdiction to tax that separate activity conducted wholly within the state. Ford Motor Co. v. Director of Revenue, 963 A.2d 115 (Del. 2008).

4 Chicago Bridge & Iron Co. v. State, Dept. of Revenue, 98 Wash. 2d 814, 659 P.2d 463 (1983).

5 Evco v. Jones, 409 U.S. 91, 93 S. Ct. 349, 34 L. Ed. 2d 325 (1972).

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XI. Interstate and Foreign Commerce

§ 167. Forms and methods of taxation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 63.5

For purposes of the Commerce Clause, there is no distinction between a tax on property and a tax upon the exercise of some of the constituent elements of such property.[1]

The Equal Protection Clause of the United States Constitution imposes no invariable rule of total equality in the exercise of the State's taxing power, and taxation on an "average presence" basis of movable personal property consisting of similar units a number of which are continuously employed within the local jurisdiction is fair and reasonable.[2]

"User fees," which are governed by a Commerce Clause analysis different from the analysis for general revenue taxes, are taxes or other fees collected by the State as reimbursement for the use of state-owned or state-provided facilities or services.[3] To qualify as a "user fee" for the purposes of the Commerce Clause, a state tax must: (1) reflect a fair, if imperfect, approximation of the cost of using state facilities for the taxpayer's benefit; (2) not discriminate against interstate commerce; and (3) not be excessive in relation to costs incurred by the taxing authorities.[4] The question is the relationship between the amount that the fees raise and the amount that the State likely spends; the Commerce Clause does not require states or courts to trace individual dollars, and the burden of proving the excessiveness of a user fee under the Commerce Clause of the Federal Constitution falls upon the party challenging the fee, not the state.[5]

A tax and a subsidy, each of which would be constitutional standing alone, might together be unconstitutional under the dormant Commerce Clause.[6] A State runs afoul of the dormant Commerce Clause when it joins an otherwise constitutional tax with an otherwise constitutional subsidy in way that benefits in-state economic interests and burdens out-of-state interests.[7]

Footnotes

1 McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876 (1940).

2 Sea-Land Service, Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal. Rptr. 448, 528 P.2d 56 (1974).

3 Center for Auto Safety Inc. v. Athey, 37 F.3d 139 (4th Cir. 1994).
A "user fee," which is not subject to voter approval requirements applicable to taxes, is charged to the person using the service, and its amount is related to the goods and services actually provided. Bay Area Cellular Telephone Co. v. City of Union City, 162 Cal. App. 4th 686, 75 Cal. Rptr. 3d 839 (1st Dist. 2008).

4 Center for Auto Safety Inc. v. Athey, 37 F.3d 139 (4th Cir. 1994).

5 New Hampshire Motor Transport Ass'n v. Flynn, 751 F.2d 43, 78 A.L.R. Fed. 273 (1st Cir. 1984).

6 DIRECTV, Inc. v. Tolson, 513 F.3d 119 (4th Cir. 2008).

7 DIRECTV, Inc. v. Tolson, 513 F.3d 119 (4th Cir. 2008).

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XI. Interstate and Foreign Commerce

§ 168. Discrimination

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.75

The dormant Commerce Clause does not prohibit all state taxation of interstate commerce but rather only that which is unduly restrictive or discriminatory.[1] States may not, consistent with the dormant Commerce Clause, impose a tax that provides a direct commercial advantage to local businesses and thus burdens and discriminates against interstate commerce.[2] In other words, the negative or dormant aspect of the Commerce Clause prohibits state taxation that discriminates against interstate commerce or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.[3] The paradigmatic example of a law that violates the dormant Commerce Clause is the "protective tariff," which taxes goods produced in other states but not those produced in-state.[4]

Observation:

The fact that a participant in interstate commerce realizes an adverse economic impact in dollars and cents for crossing a state boundary and thus becomes subject to another state's taxing jurisdiction is not by itself sufficient to establish a Commerce Clause violation as not all burdens upon commerce, but only undue or discriminatory ones, are forbidden.[5]

A state tax that favors an in-state business over an out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.[6] Therefore, a State may not discriminate against a taxpayer that conducts business in interstate commerce, by providing a direct commercial advantage to local business, and a tax that unfairly apportions activity from other states discriminates against interstate commerce.[7] Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry.[8] Discrimination between in-state and out-of-state goods is as

offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers.[9]

Practice Tip:

The party raising a Commerce Clause challenge to a state tax scheme carries the burden of persuasion.[10]

A state tax is discriminatory against interstate commerce if it is facially discriminatory, has a discriminatory intent or purpose, or has the effect of unduly burdening interstate commerce.[11] Facially discriminatory state taxes explicitly put greater burdens on out-of-state businesses or provide more favorable terms to in-state businesses.[12] When a tax, on its face, has discriminatory economic effects, it is not necessary to consider the extent of the discrimination before finding it unconstitutional under the Commerce Clause.[13] Facially discriminatory state tax laws are subject to the strictest scrutiny, and the burden of justification is so heavy that facial discrimination by itself may be a fatal defect under the Commerce Clause[14] as state laws discriminating against interstate commerce on their face are virtually per se invalid.[15] However, for Commerce Clause purposes, states may overcome the presumption of invalidity raised by facially discriminatory state tax laws by establishing that the tax advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.[16] A facially discriminatory tax may survive Commerce Clause scrutiny if it is, in fact, a compensatory tax designed to make interstate commerce bear a burden already borne by intrastate commerce.[17] The compensatory tax doctrine of Commerce Clause analysis consists of three prongs, which to satisfy the State must: (1) identify the intrastate tax burden for which the State is attempting to compensate; (2) show that the tax on interstate commerce roughly approximates, but does not exceed, the amount of the tax on intrastate commerce; and (3) demonstrate that the events on which the interstate and intrastate taxes are imposed are substantially equivalent, i.e., that they are sufficiently similar in substance to serve as mutually exclusive proxies for each other.[18]

Practice Tip:

In seeking to show that a facially discriminatory tax does not violate the Commerce Clause, the State bears the burden of showing that the requirements of the compensatory tax doctrine are clearly met.[19]

Additionally, a court will find discrimination against commerce by a state tax statute if either the statute's purpose or effect is discriminatory.[20] Under the Commerce Clause, a local regulation or tax is discriminatory without regard to its underlying purpose when it entails differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.[21] Discrimination exists when a state law taxes a transaction more heavily when it crosses state lines than when it occurs entirely within a state.[22] A state tax must be assessed in the light of its actual effect considered in conjunction with the other provisions of a state's tax scheme to determine whether the statute under attack will in its practical operation work discrimination against interstate commerce in violation of the Commerce Clause.[23] A tax does not discriminate against interstate commerce if it does not favor a local interest to the disadvantage of interstate business,[24] and a state tax satisfies the internal consistency test, and thus does not violate the Commerce Clause by discriminating against interstate commerce, if the state tax, were it to be applied by every jurisdiction, creates no impermissible interference with free trade.[25] Further, even a state tax provision that discriminates in practice against interstate commerce may pass constitutional scrutiny under the Commerce Clause if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.[26]

In order to prove that a state tax statute violates the Commerce Clause, the taxpayer need not show the extent of disparate tax treatment or demonstrate a minimal level of discriminatory effect; the taxpayer need only prove discrimination against commerce.[27] There is no "de minimis" defense to a charge of discriminatory taxation under the dormant Commerce Clause.[28]

CUMULATIVE SUPPLEMENT

Cases:

Under the dormant Commerce Clause, a State may not impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation. U.S.C.A. Const. Art. 1, § 8, cl. 3. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

If a State's tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State. U.S.C.A. Const. Art. 1, § 8, cl. 3. Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Irwin Indus. Tool Co. v. Department of Revenue, 394 Ill. App. 3d 1002, 333 Ill. Dec. 718, 915 N.E.2d 789 (1st Dist. 2009), appeal allowed, 235 Ill. 2d 588, 338 Ill. Dec. 249, 924 N.E.2d 455 (2010) and judgment aff'd, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).

2 DIRECTV, Inc. v. Levin, 181 Ohio App. 3d 92, 2009-Ohio-636, 907 N.E.2d 1242 (10th Dist. Franklin County 2009), judgment aff'd, 128 Ohio St. 3d 68, 2010-Ohio-6279, 941 N.E.2d 1187 (2010), petition for cert. filed, 79 U.S.L.W. 3636, 80 U.S.L.W. 3016 (U.S. Apr. 27, 2011).

3 General Motors Corp. v. Tracy, 519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997); Selevan v. New York Thruway Authority, 584 F.3d 82 (2d Cir. 2009); Ventas Finance I, LLC v. California Franchise Tax Bd., 165 Cal. App. 4th 1207, 81 Cal. Rptr. 3d 823 (1st Dist. 2008); Columbia Gas Transm. Corp. v. Levin, 117 Ohio St. 3d 122, 2008-Ohio-511, 882 N.E.2d 400 (2008).

4 Directv, Inc. v. Treesh, 487 F.3d 471, 51 A.L.R.6th 605 (6th Cir. 2007).

5 American Bus Ass'n, Inc. v. District of Columbia, 2 A.3d 203 (D.C. 2010).

6 American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987); American Bus Ass'n, Inc. v. District of Columbia, 2 A.3d 203 (D.C. 2010).

7 Ford Motor Co. v. Director of Revenue, 963 A.2d 115 (Del. 2008).

8 Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992); Maverick Motorsports Group, LLC v. Department of Revenue, 2011 WY 76, 253 P.3d 125, 74 U.C.C. Rep. Serv. 2d 576 (Wyo. 2011).

9 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984).

10 Irwin Indus. Tool Co. v. Department of Revenue, 394 Ill. App. 3d 1002, 333 Ill. Dec. 718, 915 N.E.2d 789 (1st Dist. 2009), appeal allowed, 235 Ill. 2d 588, 338 Ill. Dec. 249, 924 N.E.2d 455 (2010) and judgment aff'd, 238 Ill. 2d 332, 345 Ill. Dec. 20, 938 N.E.2d 459 (2010).

11 Transcontinental Gas Pipeline Corp. v. Louisiana Tax Com'n, 32 So. 3d 199 (La. 2010); McLane Minnesota, Inc. v. Commissioner of Revenue, 773 N.W.2d 289 (Minn. 2009).

12 Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

13 Emerson Elec. Co. v. Tracy, 90 Ohio St. 3d 157, 2000-Ohio-174, 735 N.E.2d 445 (2000); Annenberg v. Com., 562 Pa. 570, 757 A.2d 333 (1998).

14 Frey v. Comptroller of Treasury, 422 Md. 111, 29 A.3d 475 (2011), cert. denied, 2012 WL 986857 (U.S. 2012).

15 Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997); Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

16 Frey v. Comptroller of Treasury, 422 Md. 111, 29 A.3d 475 (2011), cert. denied, 2012 WL 986857 (U.S. 2012).

17 Transcontinental Gas Pipe Line Corp. v. Louisiana Tax Com'n, 23 So. 3d 329 (La. Ct. App. 1st Cir. 2009), rev'd on other grounds, 32 So. 3d 199 (La. 2010).

18 Frey v. Comptroller of Treasury, 422 Md. 111, 29 A.3d 475 (2011), cert. denied, 2012 WL 986857 (U.S. 2012).

19 Transcontinental Gas Pipe Line Corp. v. Louisiana Tax Com'n, 23 So. 3d 329 (La. Ct. App. 1st Cir. 2009), rev'd on other grounds, 32 So. 3d 199 (La. 2010).

20 Riverton Produce Co. v. State, 871 P.2d 1213 (Colo. 1994); Caterpillar, Inc. v. C.I.R., 568 N.W.2d 695 (Minn. 1997); Caterpillar Inc. v. New Hampshire Dept. of Revenue Admin., 144 N.H. 253, 741 A.2d 56 (1999).

21 District of Columbia v. Eastern Trans-Waste of Maryland, Inc., 758 A.2d 1 (D.C. 2000); Homier Distributing Co., Inc. v. City of Albany, 90 N.Y.2d 153, 659 N.Y.S.2d 223, 681 N.E.2d 390 (1997).

22 Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), as clarified, (Nov. 30, 1994).

23 Transcontinental Gas Pipeline Corp. v. Louisiana Tax Com'n, 32 So. 3d 199 (La. 2010).

24 Continental Trailways, Inc. v. Director, Div. of Motor Vehicles, 102 N.J. 526, 509 A.2d 769 (1986).

25 United Engineers & Constructors, Inc. v. Rose, 178 W. Va. 591, 363 S.E.2d 477 (1987).
Additional disposal fee imposed by a state on hazardous waste generated outside of the state and disposed of at a commercial facility in the state discriminated against interstate commerce in violation of the Commerce Clause. Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992).

26 DIRECTV, Inc. v. Levin, 181 Ohio App. 3d 92, 2009-Ohio-636, 907 N.E.2d 1242 (10th Dist. Franklin County 2009), judgment aff'd, 128 Ohio St. 3d 68, 2010-Ohio-6279, 941 N.E.2d 1187 (2010), petition for cert. filed, 79 U.S.L.W. 3636, 80 U.S.L.W. 3016 (U.S. Apr. 27, 2011).

27 Caterpillar Inc. v. New Hampshire Dept. of Revenue Admin., 144 N.H. 253, 741 A.2d 56 (1999).

28 Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997); Transcontinental Gas Pipe Line Corp. v. Louisiana Tax Com'n, 23 So. 3d 329 (La. Ct. App. 1st Cir. 2009), rev'd on other grounds, 32 So. 3d 199 (La. 2010).

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Part Three. Subjects of Taxation

XI. Interstate and Foreign Commerce

§ 169. Discrimination—Foreign Commerce Clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Commerce 62.75

The Commerce Clause requires that a state tax not discriminate against foreign commerce[1] and where a statute facially discriminates against foreign commerce, it is virtually per se invalid under the Foreign Commerce Clause.[2] A State may not impose taxes on foreign goods for the purpose of neutralizing the advantages belonging to the place of origin, nor may a State discriminate in favor of local business for the purpose of inducing foreign enterprises to become residents so that they may compete on an equal footing.[3]

Practice Tip:

A taxpayer who challenges a state tax statute under the Foreign Commerce Clause carries the burden of proving that discrimination exists.[4]

Footnotes

1 Gulf Oil Corp. v. State, Dept. of Revenue, 755 P.2d 372 (Alaska 1988); Miller v. Publicker Industries, Inc., 457 So. 2d 1374 (Fla. 1984).

2 Emerson Elec. Co. v. Tracy, 90 Ohio St. 3d 157, 2000-Ohio-174, 735 N.E.2d 445 (2000).

[3] Aurora Corp. of Illinois v. Tully, 60 N.Y.2d 338, 469 N.Y.S.2d 630, 457 N.E.2d 735 (1983).

[4] Caterpillar, Inc. v. C.I.R., 568 N.W.2d 695 (Minn. 1997).

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West's Key Number Digest

West's Key Number Digest, Taxation 2227 to 2232, 2238, 2491 to 2504, 2548

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A.L.R. Index, Excise Taxes
A.L.R. Index, Income Tax
A.L.R. Index, Personal Property Tax
A.L.R. Index, Taxes
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XII. Domestic Corporations

A. In General

1. Generally

§ 170. Taxability of corporations; generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2227 to 2232

A private corporation engaged in its own business for its own objects is subject to the taxing power of the State the same as any individual would be.[1] Unless exempted in terms which amount to a contract not to tax, the property, privileges, and franchises of a corporation are as much the legitimate subjects of taxation as any other property of a citizen which is within the sovereign power of the State.[2]

A legislative decision to tax corporations and not other businesses, via the individuals who comprise them, is generally permissible under the Equal Protection Clause, given the advantages that corporations enjoy in carrying on their businesses.[3]

Footnotes

1 Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S.W. 119, 49 A.L.R. 1091 (1926).

2 State Tax Commission v. Associated Mortg. Co., 175 Md. 363, 2 A.2d 401 (1938).

3 People v. James, 191 Cal. App. 4th 478, 119 Cal. Rptr. 3d 362 (5th Dist. 2010), as modified, (Dec. 30, 2010) and review denied, (Mar. 30, 2011) and cert. denied, 132 S. Ct. 220, 181 L. Ed. 2d 121 (2011).

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§ 171. Bases of taxation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2227 to 2232

A.L.R. Library

State Corporate Income Taxation of Foreign Dividends, 17 A.L.R.6th 623

In addition to income, earnings, or receipts,[1] the classic or traditional corporate bases on which taxation is levied are: (1) franchises, (2) capital stock in the hands of the corporation, (3) corporate property, and (4) shares of the capital stock in the hands of the individual stockholders.[2] In some jurisdictions, corporations must pay both income taxes and franchise taxes.[3]

Distinction:

The critical distinction between an "income tax" and a "franchise tax" is that the former are based on monies made and are imposed to compensate the state for benefits already received while the latter is imposed and payable in advance for the privilege of exercising the right to business in the state in the future.[4]

A gross earnings tax may be imposed in lieu of a property tax[5] although it has been held that a gross earnings tax is a tax upon property; earnings is merely a measure upon which a tax is determined.[6] The term "gross earnings" as used in a statute providing for a tax on the gross earnings of a public service corporation does not include a condemnation award.[7]

Footnotes

1 Board of Com'rs of Oklahoma County v. Ryan, 1924 OK 1075, 107 Okla. 278, 232 P. 834 (1924).

2 People ex rel. United States Aluminum Printing Plate Co. v. Knight, 174 N.Y. 475, 67 N.E. 65 (1903).
As to taxation of franchises and privileges, generally, see §§ 178 et seq.

3 Mississippi State Tax Com'n v. Chevron U.S.A., Inc., 650 So. 2d 1353 (Miss. 1995).

4 Mississippi State Tax Com'n v. Chevron U.S.A., Inc., 650 So. 2d 1353 (Miss. 1995); Herschend v. Director of Revenue, 896 S.W.2d 458 (Mo. 1995).

5 Soo Line R. Co. v. Commissioner of Revenue, 277 N.W.2d 7 (Minn. 1979).

6 Railway Exp. Agency, Inc. v. Commissioner of Taxation, 307 Minn. 245, 239 N.W.2d 245 (1976).

7 Newport Gas Light Co. v. Norberg, 114 R.I. 696, 338 A.2d 536 (1975).

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§ 172. Engaging in business

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2227 to 2232

Some statutes imposing taxes on corporations have been construed as not being applicable to a concern which is not engaged in or carrying on the business for which it was incorporated[1] while others have been regarded as indicating a legislative intention to impose the particular tax involved, whether or not a corporation otherwise subject thereto is engaged in the business for which it was formed, so long as its corporate existence continues.[2]

Engaging in business within the meaning of tax statutes applicable only to corporations engaged in business within the state contemplates something more than the mere maintenance of corporate existence and the protection of corporate property.[3]

Under the transactional test, to determine whether business income is derived from a transaction or activity in the regular course of the corporation's trade or business, one must consider the frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income; the central inquiry revolves around the nature of the particular transaction giving rise to the income.[4]

Footnotes

1. Fore River Shipbuilding Corp. v. Com., 248 Mass. 137, 142 N.E. 812 (1924); People ex rel. Lehigh & N.Y.R. Co. v. Sohmer, 217 N.Y. 443, 112 N.E. 181 (1916); Union Trust Co. of Spokane v. Spokane County, 145 Wash. 193, 259 P. 9 (1927).

2. People of State of New York v. Jersawit, 263 U.S. 493, 44 S. Ct. 167, 68 L. Ed. 405 (1924).

As to imposition of franchise taxes even though a corporation does not generate net income or does business in the ensuing year, see § 178.

3 State ex rel. State Corporation Com'n v. Old Abe Co., 43 N.M. 367, 94 P.2d 105, 124 A.L.R. 1085 (1939).

4 Polaroid Corp. v. Offerman, 349 N.C. 290, 507 S.E.2d 284 (1998) (abrogated on other grounds by, Lenox, Inc. v. Tolson, 353 N.C. 659, 548 S.E.2d 513 (2001)).

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A. In General

1. Generally

§ 173. Deduction of tax-exempt securities or property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2548

A State has no power to assess against a corporation a tax which is essentially a property or income tax (whether it purports to be laid directly upon the property or upon the capital stock), as distinguished from a franchise, privilege, or excise tax, without allowing a deduction for sums invested in securities of the United States or for income derived from such sources.[1]

Reminder:

Generally, states may not tax obligations of the United States government.[2]

A state statute imposing a property tax on the fair market value of the shares of bank stockholders, as construed by a state supreme court, to allow a bank to deduct from net worth not the full value of the United States obligations that it held but, rather, only a percentage of the fair obligations attributable to the assets did not violate a revenue statute providing for the exemption from state or local taxation of obligations of the United States.[3] However, brokers or dealers in a state, who engage in the sale of federally tax-exempt obligations, who are taxed in the state on the interest earned, do not receive a corporate business tax deduction for the interest expenses incurred in carrying these obligations.[4]

State franchise or excise taxes measured by capital stock or income may be imposed on corporations without deduction on

account of patents or copyrights held by the taxpayer.[5] The fact that an article within the jurisdiction of the state, owned by a corporation, is the product of a patented combination or process does not withdraw it from state taxation.[6]

Footnotes

1 Educational Films Corporation of America v. Ward, 282 U.S. 379, 51 S. Ct. 170, 75 L. Ed. 400, 71 A.L.R. 1226 (1931); State ex rel. Orr v. Buder, 308 Mo. 237, 271 S.W. 508, 39 A.L.R. 1199 (1925); Aberdeen Sav. & Loan Ass'n v. Chase, 157 Wash. 351, 289 P. 536 (1930).

2 § 153.

3 First Nat. Bank of Atlanta v. Bartow County Bd. of Tax Assessors, 470 U.S. 583, 105 S. Ct. 1516, 84 L. Ed. 2d 535 (1985).

4 D.A. Pincus and Co., Inc. v. Meehan, 235 Conn. 865, 670 A.2d 1278 (1996).

5 Stone v. Stapling Machines Co., 221 Miss. 555, 73 So. 2d 123 (1954).
As to taxability of patents and copyrights, generally, see § 150.

6 Stone v. Stapling Machines Co., 221 Miss. 555, 73 So. 2d 123 (1954).

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1. Generally

§ 174. Requiring corporation to pay tax on shares

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2227, 2238

State statutes which impose on corporations the duty to pay taxes levied against the individual shareholders upon the shares held by them, giving the corporation a remedy over against the stockholder by way of a lien upon his or her stock or a right of reimbursement out of future dividends, or both, have been upheld against various constitutional objections.[1]

Observation:

While most of such statutes involve taxation of bank shares, the rule has been applied to taxation of shares of other corporations, such as trust companies, loan and investment companies, and insurance companies.[2]

Footnotes

1. Home Sav. Bank v. City of Des Moines, 205 U.S. 503, 27 S. Ct. 571, 51 L. Ed. 901 (1907).
2. Wilcoxen v. Munn, 206 Iowa 1194, 221 N.W. 823 (1928).

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A. In General

2. Corporate Property

§ 175. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2232

The property of corporations is subject to taxation the same as that of individuals and, generally speaking, is taxed under the same principles as govern the taxation of the property of individuals.[1] In some jurisdictions, taxation is imposed by the state constitution on the personal property of a corporation, firm, or individual operating in state if it is used directly or indirectly in the carrying of persons, property, or messages.[2]

Assessing a personal property tax for inventory that a taxpayer held for the tax year or portion thereof, when it no longer held such inventory, does not violate principles of fundamental fairness and due process.[3] However, inventory in the process of manufacture, to the extent of progress payments received therefore, is not "owned" by the manufacturer and is not taxable as personal property when the property exists and is identifiable, the manufacturer collects progress payments from the buyer over the course of production, and the purchase contract includes an explicit agreement between the manufacturer and buyer providing that title to goods transfers incrementally to the buyer.[4]

All intangible personal property owned by a domiciliary corporation are subject to tax unless specifically exempted.[5]

Footnotes

1 Inter-Southern Life Ins. Co. v. Milliken, 149 Ky. 516, 149 S.W. 875 (1912).

2 Phillips Natural Gas Co. v. State, By and Through State Bd. of Equalization, 402 N.W.2d 906 (N.D. 1987).

3 Rick Case Motors, Inc. v. Tracy, 71 Ohio St. 3d 380, 1994-Ohio-176, 643 N.E.2d 1137 (1994).
As to the assessment and valuation of inventory for the purposes of taxation, see § 172.

4 ATS Ohio, Inc. v. Tracy, 76 Ohio St. 3d 297, 1996-Ohio-124, 667 N.E.2d 937 (1996).

5 Florida Steel Corp. v. Dickinson, 328 So. 2d 418 (Fla. 1976).

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§ 176. Computer software

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2232

A.L.R. Library

Computer software or printout transactions as subject to state sales or use tax, 36 A.L.R.5th 133 (secs. 3(c), 4(c) superseded in part by Applicability of State Sales and Use Tax Exemptions for Custom Programs Prepared to Special Order of Customer, 50 A.L.R.6th 261)
Property taxation of computer software, 82 A.L.R.3d 606

In some jurisdictions, computer software is "intangible personal property"[1] and therefore not subject to a statute providing for the taxation of tangible personal property.[2] Other jurisdictions hold that so much of computer software as consists of services to be rendered after purchase is not only intangible in nature but is also beyond the reach of a personal property tax statute dealing primarily with the taxation of intangibles, which generally permits only the taxation of bonds, certificates of indebtedness, or evidence of debt owed by certain corporations.[3] It has also been held that a constitutional requirement that the legislature justly value all property for ad valorem taxation is not violated by a statute providing that computer software constitutes personal property only to the extent of the value of the unmounted or uninstalled medium on or in which the information, program, or routine is stored or transmitted.[4]

"Custom" computer software licensed by a taxpayer to a corporation, rather than "canned" or mass produced software, is intangible personal property which, in some jurisdictions, is not subject to personal property taxation.[5]

It has also been held that operating systems computer software should be taxed as part of the true value of computer hardware for the purposes of business personal property since the hardware cannot function without the systems software, and the systems software thereby enhances the value of the computer hardware[6] although application software is an intangible and not subject to personal property tax.[7]

Definition:

"Computer application software" is intangible personal property consisting of imperceivable binary pulses, programs, routines, and symbolic mathematical code that controls the functioning of computer hardware and directs hardware operations.[8]

Footnotes

1 Nikolits v. Verizon Wireless Personal Communications L.P., 9 So. 3d 690 (Fla. Dist. Ct. App. 4th Dist. 2009); CompuServe, Inc. v. Lindley, 41 Ohio App. 3d 260, 535 N.E.2d 360 (10th Dist. Franklin County 1987).

2 Northeast Datacom, Inc. v. City of Wallingford, 212 Conn. 639, 563 A.2d 688 (1989).

3 Greyhound Computer Corp. v. State Dept. of Assessments and Taxation, 271 Md. 674, 320 A.2d 52, 82 A.L.R.3d 597 (1974).

4 Gilreath v. General Elec. Co., 751 So. 2d 705 (Fla. Dist. Ct. App. 5th Dist. 2000).

5 Maccabees Mut. Life Ins. Co. v. State, Dept. of Treasury, Revenue Div., 122 Mich. App. 660, 332 N.W.2d 561 (1983); Computer Associates Intern., Inc. v. City of East Providence, 615 A.2d 467 (R.I. 1992); Cache County v. Property Tax Div. of Utah State Tax Com'n, 922 P.2d 758 (Utah 1996).

6 Matter of Protest of Strayer, 239 Kan. 136, 716 P.2d 588 (1986); CompuServe, Inc. v. Lindley, 41 Ohio App. 3d 260, 535 N.E.2d 360 (10th Dist. Franklin County 1987).

7 Appeal of Western Resources, Inc., 22 Kan. App. 2d 593, 919 P.2d 1048 (1996); Dallas Cent. Appraisal Dist. v. Tech Data Corp., 930 S.W.2d 119 (Tex. App. Dallas 1996), writ denied, (Jan. 16, 1998).

8 Dallas Cent. Appraisal Dist. v. Tech Data Corp., 930 S.W.2d 119 (Tex. App. Dallas 1996), writ denied, (Jan. 16, 1998).

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2. Corporate Property

§ 177. Assessment and valuation of tangible business property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2491 to 2504

Constitutional limits on state taxation of interstate corporations are not stringent; states are given wide latitude in the use of formulas to measure the value of property located within their borders.[1] Property may be reasonably and lawfully valued based on the purchase price.[2]

Urban real estate, corporately owned, can be assessed for tax purposes solely upon the basis of its value, not upon its current use.[3]

A State may use antecedent facts as the criteria in valuing personal property used in a business for prospective personal property taxation.[4] Although intangible personal property is exempt from taxation, it may add value to taxable, tangible property, and to that extent, it should be included in any assessment in order to properly reflect the true value of the property.[5]

Depreciation rates used for property taxation purposes are sufficient where those employed are ordinarily used by the taxpayer in corporate balance sheets,[6] and depreciated book value is the "true value" unless there is a proper finding that the "true value" is other than the depreciated book value.[7] Economic obsolescence as a factor reducing the appraised value of an asset for property tax purposes is a form of depreciation, which may be applicable when physical depreciation of the asset fails to adequately recognize its decline in value.[8]

In assessing the taxable inventory of a manufacturer, a tax commissioner in arriving at the true value of such property, pursuant to a statute relating to valuation of accounts and personal property and a statute pertaining to rules governing assessments, must consider all the competent evidence indicating that the depreciated book value is greater or less than the true value in money.[9] It has also been held that the true value in money of a taxpayer-manufacturer's nondamaged raw material inventory would be the cost of replacing such inventory on a critical date.[10] Inventory that a taxpayer held during

taxable years in dispute must be included in its average monthly inventory calculations even though the taxpayer sold the inventory to another merchant and completely withdrew from the business before the personal property taxes were due.[11] In valuing inventory in the current tax year, the inventory valuation statutes may draw on the antecedent fact of holding inventory during the prior year.[12]

The stock and debt approach for determining property values involves estimating the market value of the operating property; the "operating property" is property used and needed to operate a business and includes intangibles such as cash because cash is necessary for carrying on a business; "non-operating property" is other property.[13]

The State may also attempt to tax the intangible "going-concern" value as well as the value of the tangible assets of an interstate business within the state.[14]

Footnotes

1 Southern Pacific Transp. Co. v. Department of Revenue, 302 Or. 582, 732 P.2d 18 (1987).

2 Buckeye Internatl., Inc. v. Limbach, 64 Ohio St. 3d 264, 1992-Ohio-55, 595 N.E.2d 347 (1992).

3 Cardinal Federal Sav. and Loan Ass'n v. Cuyahoga County Bd. of Revision, 44 Ohio St. 2d 13, 73 Ohio Op. 2d 83, 336 N.E.2d 433 (1975).

4 Valvoline Instant Oil Change, Inc. v. Tracy, 78 Ohio St. 3d 53, 1997-Ohio-7, 676 N.E.2d 114 (1997).

5 RT Communications, Inc. v. State Bd. of Equalization for State of Wyo., 11 P.3d 915 (Wyo. 2000).

6 Warner Amex Cable Communications Inc. v. Board of Assessors of Everett, 396 Mass. 239, 485 N.E.2d 177 (1985).

7 Monsanto Co. v. Lindley, 56 Ohio St. 2d 59, 10 Ohio Op. 3d 113, 381 N.E.2d 939 (1978).

8 Midwest Processing Co., a Subsidiary of Archer Daniels Midland Co. v. McHenry County By and Through McHenry County Bd. of Com'rs, 467 N.W.2d 895 (N.D. 1991).

9 PPG Industries, Inc. v. Kosydar, 65 Ohio St. 2d 80, 19 Ohio Op. 3d 268, 417 N.E.2d 1385 (1981).
As to taxability of inventory, generally, see § 175.

10 Appeal of AMP Incorporated, 287 N.C. 547, 215 S.E.2d 752 (1975).

11 Rick Case Motors, Inc. v. Tracy, 71 Ohio St. 3d 380, 1994-Ohio-176, 643 N.E.2d 1137 (1994).

12 J.M. Smucker, L.L.C. v. Levin, 113 Ohio St. 3d 337, 2007-Ohio-2073, 865 N.E.2d 866 (2007).

13 Michigan Wisconsin Pipe Line Co. v. Iowa State Bd. of Tax Review, 368 N.W.2d 187 (Iowa 1985).

14 Northwest Natural Gas Co. v. Clark County, 98 Wash. 2d 739, 658 P.2d 669 (1983) (abrogated on other grounds by, Weyerhaeuser Co. v. Easter, 126 Wash. 2d 370, 894 P.2d 1290 (1995)).

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West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

The legislature is empowered to impose a reasonable excise on any franchise or privilege conferred by the Commonwealth.[1] A corporate franchise tax is a tax on the privilege of doing business in the state,[2] which confers economic benefits including the opportunity to realize gross income and the right to invoke the protection of local law.[3] It is not a tax on the property of the paying entity,[4] nor is it a tax on doing business.[5] Such taxes are not placed upon a particular corporate business or transaction but upon the privilege of doing business as a corporation and exercising corporate powers for the purpose of producing a profit.[6]

Observation:

Franchise taxes are of two types, organization taxes, i.e., fees imposed upon the grant of corporate powers, and excises levied periodically, usually annually, upon the franchise or privilege of corporations to do business in the state.[7]

A franchise tax is an annual tax which varies with the nature, extent, and magnitude of business conducted by the corporation within the state.[8] In some jurisdictions, a corporation that carries on business within a state must pay a minimum state excise tax even though it does not generate net income[9] and regardless of whether it in fact does business in the ensuing year.[10]

Footnotes

1 Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 439 N.E.2d 282 (1982).

2 Ohio Grocers Assn. v. Levin, 123 Ohio St. 3d 303, 2009-Ohio-4872, 916 N.E.2d 446 (2009); TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432 (Tex. 2011).

3 Southwestern Bell Telephone Co. v. Combs, 270 S.W.3d 249 (Tex. App. Amarillo 2008), review denied, (Oct. 1, 2010).

4 Mutual Holding Co. v. Limbach, 71 Ohio St. 3d 59, 1994-Ohio-30, 641 N.E.2d 1080 (1994).

5 Diamond Financial Holdings, Inc. v. Limbach, 67 Ohio St. 3d 228, 1993-Ohio-4, 617 N.E.2d 670 (1993).

6 Broadmoor-Kingsport Apartments, Inc. v. State, 686 S.W.2d 70 (Tenn. 1985).

7 Praxair Technology, Inc. v. Director, Div. of Taxation, 201 N.J. 126, 988 A.2d 92 (2009).

8 Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977).

9 Pacific First Federal Sav. Bank v. Department of Revenue, State of Or., 308 Or. 332, 779 P.2d 1033 (1989).

10 Diamond Financial Holdings, Inc. v. Limbach, 67 Ohio St. 3d 228, 1993-Ohio-4, 617 N.E.2d 670 (1993).
As to necessity of and what constitutes doing business, generally, see § 172.

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B. Franchises and Privileges

1. In General

§ 179. Validity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

The right of a State to tax the franchises of domestic corporations, including both the franchise to exist or do business in the corporate form and any special franchises that particular corporations may enjoy, by assessment and valuation, as it taxes other property in the state, has been repeatedly upheld.[1] However, certain provisions of a corporate franchise tax statute that increases the franchise tax obligation of a corporation for an accounting near or already closed at the time of the enactment are void as a retroactive law in violation of the Constitution.[2]

A charter or incorporation fee imposed upon domestic corporations, whatever the amount, is valid although the company proposes to engage in interstate commerce.[3]

It is not within the province of the court to invalidate the excise tax on mutual banks merely because due to recent economic changes, it has become unduly burdensome.[4]

Footnotes

1 Pullman Co. v. Commissioner of Taxation, 223 Minn. 96, 25 N.W.2d 838 (1947).

2 Buckeye Potato Chip Co., Inc. v. Kosydar, 45 Ohio St. 2d 270, 74 Ohio Op. 2d 427, 344 N.E.2d 137 (1976).

3 Canton R. Co. v. Rogan, 340 U.S. 511, 71 S. Ct. 447, 95 L. Ed. 488, 20 A.L.R.2d 145 (1951).

[4] Andover Sav. Bank v. Commissioner of Revenue, 387 Mass. 229, 439 N.E.2d 282 (1982).

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B. Franchises and Privileges

1. In General

§ 180. Tax on privilege of declaring dividends

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2239, 2540

The validity of a tax on the privilege or act of declaring and receiving corporate dividends with respect to domestic corporations has been upheld.[1] Such a statute does not violate the Commerce Clause of the Federal Constitution.[2]

Dividends paid to a corporation's shareholders are required to be reported as federal taxable income and, consequently, as state net income for the computation of a state franchise tax, but reasonable compensation paid to shareholders as employees is not.[3]

Footnotes

1 Wisconsin Gas & Electric Co. v. U. S., 322 U.S. 526, 64 S. Ct. 1106, 88 L. Ed. 1434 (1944).

2 State of Wisconsin v. Minnesota Mining & Mfg. Co., 311 U.S. 452, 61 S. Ct. 253, 85 L. Ed. 274 (1940).

3 Cohen & Co. v. Limbach, 40 Ohio St. 3d 52, 531 N.E.2d 699 (1988).

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1. In General

§ 181. Computation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

In some jurisdictions, a state franchise tax or excise tax can be measured on net income[1] or gross receipts.[2] "Net income" under a franchise tax includes the gain realized from a sale of a capital asset,[3] as well as interest income of any kind that is derived from securities or indebtedness.[4] It has been held that the taxable income that is required to be reported for federal income tax purposes is also net income for the purposes of calculating a franchise tax imposed on corporations for the privilege of exercising a franchise.[5]

Various deductions may be provided for, such as loss carryover deductions[6] and depreciation deductions.[7]

The portion of a franchise tax statute stating that the tax must be computed from the "books and records of the corporation" is not a requirement that the commissioner follow the categorizations placed upon the information contained in the corporate books and records; rather, the statute authorizes the commissioner to require such facts and information as is deemed necessary to comply with his or her duty to assess a franchise tax in accordance with the statute.[8] No matter how correct certain accounting standards may be, the franchise tax statute itself must control the permissible accounting method available for the measurement of the franchise tax base.[9]

Footnotes

1 Hoover Universal, Inc. v. Limbach, 61 Ohio St. 3d 563, 575 N.E.2d 811 (1991); Pacific First Federal Sav. Bank v. Department of Revenue, State of Or., 308 Or. 332, 779 P.2d 1033 (1989).

2 Ohio Grocers Assn. v. Levin, 123 Ohio St. 3d 303, 2009-Ohio-4872, 916 N.E.2d 446 (2009).

3 Cameo, Inc. v. Lindley, 67 Ohio St. 2d 274, 21 Ohio Op. 3d 172, 423 N.E.2d 461 (1981).

4 Garfield Trust Co. v. Director, Div. of Taxation, 102 N.J. 420, 508 A.2d 1104 (1986).

5 Cohen & Co. v. Limbach, 40 Ohio St. 3d 52, 531 N.E.2d 699 (1988).

6 B.F. Goodrich Co. v. Dubno, 196 Conn. 1, 490 A.2d 991 (1985).

7 Bill DeLuca Enterprises, Inc. v. Commissioner of Revenue, 431 Mass. 314, 727 N.E.2d 508 (2000); Zalud Oldsmobile Pontiac, Inc. v. Tracy, 77 Ohio St. 3d 74, 1996-Ohio-90, 671 N.E.2d 32 (1996).

8 Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977).

9 Broadwell Realty Corp. v. Coble, 291 N.C. 608, 231 S.E.2d 656 (1977).

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1. In General

§ 182. Affiliated corporations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

Whether or not in a particular case the fiction of corporate identity may be ignored in the assessment of a corporate franchise tax depends, of course, upon the specific factual situation at hand and the proper construction and interpretation of the applicable statutory provisions.[1]

In the absence of evidence that a parent has dominated the finances, policies, and practices of a subsidiary, a tax administrator and the courts will respect the independent character of each corporation and regard each corporation as a separate taxable entity.[2] A corporation will not be deemed a unitary corporation for the purposes of taxation merely because the income from a subsidiary or a division adds to the richness of the corporation.[3] Occasional oversight with respect to the capital structure, debt, and dividends that a parent corporation gives a subsidiary is not enough in itself to establish a unity relationship so as to constitute a unitary corporation for the purposes of taxation.[4] In order for two businesses to be considered unitary, and thus be allowed to have their incomes combined for franchise tax purposes, one requirement is the unity of ownership of the businesses; the decisive inquiry is whether the two businesses are sufficiently interconnected in the shared performance of their operational functions and the executive decisionmaking to be treated as a unitary business.[5]

Additionally, parent and subsidiary corporations may choose to have the state corporate excise tax based on combined net income.[6]

The value of a subsidiary's stock held by a corporate taxpayer for the purposes of a franchise tax is properly calculated using the net worth basis method.[7] The process of calculating the portion of a holding company's equity that is attributable to a subsidiary, for the purpose of calculating the subsidiary's ad valorem tax obligation, should utilize the equity total for the holding company that includes the holding company's preferred stock and is valued based on the average of stock prices for the last quarter of each calendar year prior to the assessment date.[8] However, a domestic corporation may exclude from its

capital stock tax the value of the shares of its domestic subsidiaries where the subsidiaries have already paid their own capital stock tax.[9]

For state franchise tax purposes, a branch office has no corporate or jural identity separate from the corporations of which it is a part.[10]

Footnotes

1 H.A.S. Loan Service v. McColgan, 21 Cal. 2d 518, 133 P.2d 391, 145 A.L.R. 349 (1943).

2 Lily Truck Leasing Corp. of Rhode Island v. Clark, 556 A.2d 565 (R.I. 1989).

3 Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation, 100 N.J. 1, 494 A.2d 775 (1985).

4 Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation, 100 N.J. 1, 494 A.2d 775 (1985).

5 Dental Ins. Consultants, Inc. v. Franchise Tax Bd., 1 Cal. App. 4th 343, 1 Cal. Rptr. 2d 757 (1st Dist. 1991).

6 Walter Kidde & Co., Inc. v. Commissioner of Revenue, 389 Mass. 577, 451 N.E.2d 420 (1983); Hoover Universal, Inc. v. Limbach, 61 Ohio St. 3d 563, 575 N.E.2d 811 (1991).

7 Gray Horse, Inc. v. Limbach, 66 Ohio St. 3d 631, 1993-Ohio-5, 614 N.E.2d 1038 (1993).

8 Union Pacific R. Co. v. Department of Revenue, 315 Or. 11, 843 P.2d 864 (1992).

9 Com. v. After Six, Inc., 489 Pa. 69, 413 A.2d 1017 (1980).

10 Reuters Ltd. v. Tax Appeals Tribunal, 82 N.Y.2d 112, 603 N.Y.S.2d 795, 623 N.E.2d 1145 (1993).

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1. In General

§ 183. Affiliated corporations—Mergers and reorganizations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

Where two new taxpayers are created on the reorganization of several existing corporations, the new corporations are required to list their taxable personal property on a certain specified day.[1] Qualifying personal property which a surviving parent corporation acquired from subsidiaries in a merger must be considered as a parent corporation's own, rather than the property of the subsidiary corporation filed on the parent's consolidated property tax return, for the purposes of an investment tax credit on a franchise tax return where the subsidiary corporations did not exist when the parent filed its consolidated return and paid the property tax.[2]

In some jurisdictions, the deduction of premerger net operating loss from taxable income by a surviving corporation is not allowed.[3] In other jurisdictions, a surviving corporation in a merger may carry over and deduct the net operating loss which was incurred by the nonsurviving corporation in a merger from the surviving corporation's state corporate franchise tax.[4]

Footnotes

1 Gulf Western Forming Co. v. Collins, 48 Ohio St. 2d 364, 2 Ohio Op. 3d 479, 358 N.E.2d 606 (1976).

2 Hoover Universal, Inc. v. Limbach, 61 Ohio St. 3d 563, 575 N.E.2d 811 (1991).

3 Golf Digest/Tennis, Inc. v. Dubno, 203 Conn. 455, 525 A.2d 106 (1987); GBN, Inc. v. Montana Dept. of Revenue, 249 Mont. 261, 815 P.2d 595 (1991).

4 Litton Indus. Products, Inc. v. Limbach, 58 Ohio St. 3d 169, 569 N.E.2d 481 (1991).

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2. Character of Tax as Property Tax

§ 184. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

State statutes sometimes, although not invariably,[1] put corporate franchises, or at least certain classes of them, on an ad valorem basis for the purposes of taxation.[2] A franchise tax may be levied on domestic corporations based upon the amount of their net worth in the state[3] although measuring tax liability in terms of net worth does not convert a franchise tax into a "property tax."[4] The "minimum net worth" of a corporation, for the purposes of a franchise tax, is the actual value of the property owned, or property used, in the state[5] although corporate franchise taxes need not be based solely on the amount of property owned within a state so long as they bear some real and reasonable relation to the privilege granted or to the protection of the interests of the State.[6]

Under corporate franchise tax laws providing that the tax situs of securities or credits producing revenue shall be either at the business situs of such securities or credits or at the commercial domicile of the corporation, the securities or credits qualify for a business situs only if they are so used in the taxpayer's business as to acquire a situs of their own.[7]

A corporate taxpayer's partnership interest is "property," albeit intangible, that is to be included in computing its statutory franchise tax base.[8]

CUMULATIVE SUPPLEMENT

Cases:

Assets of a subsidiary corporation are not exempt from franchise taxation; such assets are included in the parent corporation's franchise-tax base. Miss. Code Ann. § 27-13-9. Williams Companies, Inc. v. Mississippi Department of Revenue, 296 So. 3d 681 (Miss. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Utah-Idaho Sugar Co. v. Salt Lake County, 60 Utah 491, 210 P. 106, 27 A.L.R. 874 (1922).

[2] Bank of Cal. v. City and County of San Francisco, 142 Cal. 276, 75 P. 832 (1904).

[3] Opinion of the Justices, 756 So. 2d 21 (Ala. 1999).

[4] Mutual Holding Co. v. Limbach, 71 Ohio St. 3d 59, 1994-Ohio-30, 641 N.E.2d 1080 (1994).

[5] Omnicon, Inc. v. King, 688 S.W.2d 818 (Tenn. 1985).

[6] Armour & Co. v. Kosydar, 46 Ohio St. 2d 450, 75 Ohio Op. 2d 502, 349 N.E.2d 301 (1976).

[7] North Baton Rouge Development Co., Inc. v. Collector of Revenue, 304 So. 2d 293 (La. 1974).

[8] Tollett v. Franklin Equities, Inc., 586 S.W.2d 96 (Tenn. 1979).

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B. Franchises and Privileges

2. Character of Tax as Property Tax

§ 185. Assessment and valuation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2233, 2540

For the purpose of determining the base upon which to compute a corporate franchise tax, consideration must be given to the applicable statutes rather than to accounting practices not based upon such statutes.[1]

Where a State stipulates to the book value of property and makes no attempt to offer specific evidence of other values such as the local assessed value for tax purposes, replacement value, insurance on property, income generated by the property, and appraised value, there is no error in using the book value of the property to compute franchise tax.[2]

Definition:

For purposes of a corporate franchise tax, the "book value" of property owned or used by a corporation is determined from the "books" of a corporation, which are generally regarded as the accounting records of such corporation and are kept in the ordinary course of the business of the corporation in accordance with any sound and generally recognized and approved accounting system.[3]

In an ad valorem tax system, although an augmentation in value attributed to the existence of tangible property as part of a going concern is a relevant factor in valuing the individual units of tangible property located in the state, the validity of the

apportionment may be broken down to individual units; however, an excise tax is imposed on the value of the local franchise valued as a going concern in its organic relations and not merely as a congeries of unrelated items.[4]

"Appreciation" as used in a statute setting forth the method for calculating the net worth of a corporation for franchise tax purposes is an increase in value over some period of time.[5] For franchise tax purposes, the concept of instantaneous appreciation goes against the concept of appreciation as an increase in value over time; "appreciation" is the difference between two values, and for there to be an increase in value, there must be a starting value against which the increase is measured.[6]

A privilege tax statute providing that where any part of property standing as security for the payment of a debt is located part within and part without the state, only that portion of the amount covered by the instrument shall be taxed as the value of property within the state bears to the whole property means the whole property standing as security for the indebtedness, wherever the property may be located.[7]

The net worth of a partnership, rather than the book value of the partnership assets, is the proper measure of a corporate taxpayer's interest in a partnership for the purposes of franchise tax law.[8]

CUMULATIVE SUPPLEMENT

Cases:

Work performed by labor subcontractors on offshore oil rigs had a reasonable connection to improvements on real property, and thus taxpayer's payments to subcontractors qualified for franchise tax revenue exclusion for flow-through payments to subcontractors in connection with the design, construction, remodeling, remediation, or repair of improvements on real property, where subcontractors engaged in activities that resulted in offshore drilling rigs' obtaining and maintaining certification requirements imposed by marine classification societies, complying with regulations applicable to offshore drilling rigs, and meeting requirements imposed by contracts between exploration and production companies and drilling rigs' owners. Tex. Tax Code Ann. § 171.1011(g)(3). Hegar v. Gulf Copper and Manufacturing Corporation, 535 S.W.3d 1 (Tex. App. Austin 2017), petition for review filed, (Dec. 20, 2017).

[END OF SUPPLEMENT]

Footnotes

1 North High Realty Co. v. Evatt, 143 Ohio St. 231, 28 Ohio Op. 144, 54 N.E.2d 783, 153 A.L.R. 686 (1944).

2 Com. v. Morewood Realty Corp., 458 Pa. 204, 327 A.2d 328 (1974).

3 Goodyear Tire & Rubber Co. v. Tracy, 85 Ohio St. 3d 615, 1999-Ohio-325, 710 N.E.2d 686 (1999).

4 Maine Cent. R. Co. v. Halperin, 381 A.2d 8 (Me. 1977).

5 Edwards Industries, Inc. v. Tracy, 74 Ohio St. 3d 643, 1996-Ohio-156, 660 N.E.2d 1181 (1996).

6 Edwards Industries, Inc. v. Tracy, 74 Ohio St. 3d 643, 1996-Ohio-156, 660 N.E.2d 1181 (1996).

7 Connecticut Bank and Trust Co., N.A. v. Tennessee Dept. of Revenue, 769 S.W.2d 205 (Tenn. 1989).

8 Omnicon, Inc. v. King, 688 S.W.2d 818 (Tenn. 1985).

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Research References

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West's Key Number Digest, Taxation 2103, 2235, 2236, 2545 to 2554, 2566

A.L.R. Library

A.L.R. Index, Excise Taxes
A.L.R. Index, Income Tax
A.L.R. Index, Personal Property Tax
A.L.R. Index, Taxes
A.L.R. Index, Taxpayers
A.L.R. Index, Tax Returns
West's A.L.R. Digest, Taxation 2103, 2235, 2236, 2545 to 2554, 2566

Trial Strategy

Valuation of Stock of Closely Held Corporations, 2 Am. Jur. Proof of Facts 2d 1

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§ 186. Generally; meaning of “capital” and “capital stock”

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Taxation 2103, 2235, 2236

In some jurisdictions, a franchise tax is levied upon the net worth or capital of the corporation.[1] In other jurisdictions, it is held that a domestic corporation may be subject to a capital stock tax, which is an annual tax based on the value of the corporation’s capital stock, and such tax is justified on the basic constitutional premise that a corporation’s property may be taxed in the state of its creation.[2] A capital stock tax is actually a tax upon the properties and assets of a corporation[3] although in some jurisdictions, a tax on shares of stock issued by a corporation is not a tax on the capital of the corporation.[4]

Footnotes

1 Omnicon, Inc. v. King, 688 S.W.2d 818 (Tenn. 1985).

2 Com. v. After Six, Inc., 489 Pa. 69, 413 A.2d 1017 (1980).

3 Spang Stores, Inc. v. Com., 468 Pa. 63, 360 A.2d 180 (1976).

4 Mutual Holding Co. v. Limbach, 71 Ohio St. 3d 59, 1994-Ohio-30, 641 N.E.2d 1080 (1994).

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§ 187. Kinds of shares contemplated

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2103, 2235, 2236, 2566

Statutes imposing taxes upon, or measuring them by, capital stock have been variously construed as contemplating all shares which the corporation is authorized by its articles of incorporation to have, rather than merely the shares which it is authorized by applicable regulation of an administrative body to issue,[1] or all the issued and outstanding shares[2] and not returned or canceled in accordance with law, although some of them have been reacquired by the corporation and are held as treasury stock.[3]

Certificate of amendments of a corporate charter changing stock from shares with par value to shares without par value does not "increase the authorized capital stock" of the corporation for the purpose of assessing the tax payable upon the filing of the certificate.[4]

Footnotes

1 Armstrong v. Emmerson, 300 Ill. 54, 132 N.E. 768, 18 A.L.R. 693 (1921).

2 Motorists Development Co. v. Lindley, 69 Ohio St. 2d 220, 23 Ohio Op. 3d 230, 431 N.E.2d 659 (1982).

3 North High Realty Co. v. Evatt, 143 Ohio St. 231, 28 Ohio Op. 144, 54 N.E.2d 783, 153 A.L.R. 686 (1944).

4 Chrysler Corp. v. State, 457 A.2d 345 (Del. 1983).

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§ 188. Valuation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2545 to 2554

A.L.R. Library

Liability of corporation which has previously paid franchise fee or tax on authorized or issued stock, for additional fee or tax on later increase after intermediate reduction, 16 A.L.R.2d 1090

Trial Strategy

Valuation of Stock of Closely Held Corporations, 2 Am. Jur. Proof of Facts 2d 1

In some jurisdictions, the properly recorded value shown on the books of a corporate taxpayer is the value that the taxpayer must report on a franchise tax return pursuant to a statute requiring a taxpayer to determine the value of its issued and outstanding shares of stock according to the total value as shown by the books of the company.[1] However, it has been held that the valuation of the capital stock of a corporation for the purposes of a capital stock tax is a matter of judgment; accounting figures are not a determination of valuation, and the book values are not evidence of the actual value for capital stock tax purposes.[2]

In other jurisdictions, the franchise tax must be paid, first, upon the par value of the outstanding stock and, second, the

surplus.[3]

Definition:

For a franchise tax, "surplus" is defined as the excess of assets employed in the business over the par value of the outstanding capital stock.[4]

Under a statute providing that a corporate franchise tax shall be calculated on the basis of the value of the capital employed, measured by the combined issued and outstanding capital stock, surplus, and undivided profits, the value of the capital cannot be measured except by the three items enumerated in the statute.[5] The term "undivided profits," as an item of capital employed in the state for the purpose of determining the taxpayer's franchise tax base, is limited to the sums which have come into the possession and control of the taxpayer and which are presently available for division and distribution among the shareholders.[6]

Finally, the use of average annual stock prices in valuing stock for tax purposes is not impermissible.[7]

Footnotes

1 Tarver v. E.I. Du Pont De Nemours and Co., 634 So. 2d 356 (La. 1994); Bush & Cook Leasing, Inc. v. Tracy, 79 Ohio St. 3d 87, 1997-Ohio-404, 679 N.E.2d 1077 (1997).

2 Spang Stores, Inc. v. Com., 468 Pa. 63, 360 A.2d 180 (1976).

3 Boatmen's Bancshares, Inc. v. Director of Revenue, 757 S.W.2d 574 (Mo. 1988).

4 Boatmen's Bancshares, Inc. v. Director of Revenue, 757 S.W.2d 574 (Mo. 1988).

5 Mississippi State Tax Commission v. Illinois Cent. Gulf R. Co., 360 So. 2d 1218 (Miss. 1978).

6 Mississippi State Tax Com'n v. Dyer Inv. Co., Inc., 507 So. 2d 1287 (Miss. 1987).

7 Beaver County v. Utah State Tax Com'n, 916 P.2d 344 (Utah 1996).

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Part Three. Subjects of Taxation

XII. Domestic Corporations

C. Capital and Capital Stock

§ 189. Capital employed within state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2103, 2235, 2236, 2566

Since a State cannot constitutionally levy a property tax on tangible property located outside the state, such property must be excluded from the capital stock tax of a domestic corporation,[1] and the computation of a tax on the "actual amount of capital employed in the state" must be based on property of the corporation that is within the state and used in business transacted within the state.[2] For the purpose of determining the value of "capital employed in this state," to identify the taxpayer's franchise tax base, capital employed in the state is composed of four items: capital stock, surplus, undivided profits, and true reserves.[3]

Footnotes

[1] Com. v. After Six, Inc., 489 Pa. 69, 413 A.2d 1017 (1980).

[2] State v. Travelers Ins. Co., 256 Ala. 61, 53 So. 2d 745 (1951).

[3] Mississippi State Tax Com'n v. Dyer Inv. Co., Inc., 507 So. 2d 1287 (Miss. 1987).

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XIII. Foreign Corporations

A. Extent of Power of States

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3006, 3355, 3560, 3580

West's Key Number Digest, Taxation 2103, 2254 to 2259, 2562, 2563

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A.L.R. Index, Income Tax
A.L.R. Index, Personal Property Tax
A.L.R. Index, Taxes
A.L.R. Index, Taxpayers
A.L.R. Index, Tax Returns
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Part Three. Subjects of Taxation

XIII. Foreign Corporations

A. Extent of Power of States

§ 190. Generally; what constitutes "doing business"

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2103, 2254 to 2259, 2562, 2563

A corporation organized for profit and carrying out the purposes of its organization is "doing business" within the state for franchise tax purposes.[1] Similarly, "doing business" within the intent of a state statute imposing a license or occupation tax on foreign corporations doing business within the state means any activity or transaction for the purpose of financial profit or gain; such construction does not violate the due process clause of either the federal or state constitution.[2] As the due process clause does not contemplate that a State may impose a tax on a corporation with which it has no contacts, ties, or relations, a corporation's activities which are related to a claimed obligation must establish that it has sufficient contacts or ties with the State to make it reasonable and just, according to the traditional conception of fair play and substantial justice, to permit the State to enforce the obligation.[3]

A foreign corporation's maintenance of an office or agents within a state is not a necessary prerequisite under the due process clause to the State's exercise of power of taxation against it.[4] The fact that a foreign corporation performs acts in a taxing state through persons that it designates as independent contractors is not determinative of whether the nexus between a foreign corporation and a state required for taxation is present.[5] However, a foreign corporation is "doing business" within a state, for the purpose of imposing a franchise tax, where the corporation employs representatives in the state, whose primary functions are to drum up business, and in conducting those activities, the corporation, through its representatives, uses the state's resources and derives a substantial profit therefrom[6] although it has also been held that a foreign corporation is exempt from a state corporate franchise tax where its activities within the state do not go beyond the bounds of what may reasonably be deemed a mere solicitation of orders.[7]

Footnotes

1 Wurlitzer Co. v. State Tax Commission, 35 N.Y.2d 100, 358 N.Y.S.2d 762, 315 N.E.2d 805 (1974).

2 Chattanooga Glass Co. v. Strickland, 244 Ga. 603, 261 S.E.2d 599 (1979).

3 Black Const. Corp. v. Agsalud, 64 Haw. 274, 639 P.2d 1088 (1982).

4 Associated Elec. & Gas Ins. Services, Ltd. v. Clark, 676 A.2d 1357 (R.I. 1996).

5 Illinois Commercial Men’s Assn. v. State Bd. of Equalization, 34 Cal. 3d 839, 196 Cal. Rptr. 198, 671 P.2d 349 (1983).

6 Clairol Inc. v. Com., 513 Pa. 74, 518 A.2d 1165 (1986).

7 Gillette Co. v. State Tax Commission, 45 N.Y.2d 846, 410 N.Y.S.2d 65, 382 N.E.2d 764 (1978).

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XIII. Foreign Corporations

A. Extent of Power of States

§ 191. Multi-state corporations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2103, 2254 to 2259, 2562, 2563

In taxing multi-state corporations, the assumption is made that all income is reasonably related to the business activity in a taxing state because the business is a "unitary" one, but if any part of the total income is not so related and may be so identified, taxing any part of it would violate due process.[1] Capital derivation is determined, for the purposes of assessing a franchise tax on the receipts of a multi-state corporation, by a two-step process; the first step is to determine total capital, and the second step is to determine the relationship to the activities in the state to the total activities of the corporation nationwide.[2]

Observation:

The principles which govern the validity of state taxes levied upon multi-state businesses seek to accommodate the necessary abstractions of tax theory to the realities of the market place.[3]

The fact that a foreign multinational enterprise is exposed to the risk of multiple taxation as a result of a state's worldwide combined reporting method for computing corporate franchise tax does not violate the Commerce Clause.[4]

Footnotes

[1] Johns-Manville Products Corp. v. Commissioner of Revenue Administration, 115 N.H. 428, 343 A.2d 221 (1975).

[2] Mississippi State Tax Com'n v. Chevron U.S.A., Inc., 650 So. 2d 1353 (Miss. 1995).

[3] Trinova Corp. v. Michigan Dept. of Treasury, 498 U.S. 358, 111 S. Ct. 818, 112 L. Ed. 2d 884 (1991).

[4] Barclays Bank PLC v. Franchise Tax Bd. of California, 512 U.S. 298, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994).

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XIII. Foreign Corporations

A. Extent of Power of States

§ 192. Retaliatory statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3006, 3355, 3560, 3580

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Construction, application, and operation of state "retaliatory" statutes imposing special taxes or fees on foreign insurers doing business with the state, 30 A.L.R.4th 873

In order to protect domestic corporations doing business in other states from undue burdens placed upon them by foreign states, many states have enacted what are commonly designated as "retaliatory statutes" against foreign corporations doing business in the state, which impose upon such corporations the same taxes and license fees as are imposed by the state of incorporation upon foreign corporations doing business in that state.[1] A state statute, which imposes a retaliatory tax on out-of-state insurers doing business in that state when the insurer's state of incorporation imposes higher taxes on the legislating state's insurers doing business in the out-of-state insurer's state than the legislating State would otherwise impose on out-of-state insurers doing business within its boundaries, does not violate the Commerce Clause of the Federal Constitution or the Equal Protection Clause of the 14th Amendment.[2] A retaliatory tax statute is subject to minimum constitutional scrutiny and only has to serve a legitimate state purpose and bear a fair and substantial relationship to its burden.[3]

Insurance tax statutes governing retaliatory taxes on insurance premiums for policies sold in the state by a foreign insurer did not require life insurance premiums, and premiums on all other polices, to be aggregated, for the purposes of calculating the foreign insurer's retaliatory tax obligation, but rather expressly provided that the life insurance premiums were to be treated separately.[4]

Footnotes

1 State v. Continental Ins. Co. of New York, 67 Ind. App. 536, 116 N.E. 929 (1917); Pacific Mut. Life Ins. Co. of California v. State, 161 Wash. 135, 296 P. 813 (1931).

2 Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

3 Premera Blue Cross v. State, Dept. of Commerce, Community & Economic Development, Div. of Ins., 171 P.3d 1110 (Alaska 2007).

4 Prudential Ins. Co. of America v. Commissioner of Revenue, 429 Mass. 560, 709 N.E.2d 1096 (1999).

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A.L.R. Index, Personal Property Tax
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1. Excise, Privilege, and Franchise Taxes

§ 193. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

A.L.R. Library

Comment Note.—Validity, under Federal Constitution, of state tax on, or measured by, income of foreign corporation, 67 A.L.R.2d 1322

A State may not impose upon a foreign corporation a tax for the privilege of engaging in interstate commerce.[1] A franchise tax that a State assesses against foreign corporations violates the Commerce Clause where the franchise tax scheme imposes a higher tax burden on foreign, as opposed to domestic, corporations.[2]

Since a state privilege tax, imposed on the out-of-state operations of a foreign corporation conducting business intrastate, violates the Commerce Clause of the Federal Constitution, such a tax may not be imposed as a prerequisite to doing business in the state.[3]

Footnotes

1 Best & Co. v. Maxwell, 311 U.S. 454, 61 S. Ct. 334, 85 L. Ed. 275 (1940); Commissioner of Corporations and

Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936 (1941).
As to taxation of interstate and foreign commerce, generally, see §§ 157, 158

2 South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999).

3 Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

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1. Excise, Privilege, and Franchise Taxes

§ 194. Measure and amount

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

A State cannot circumvent the prohibition of the Commerce Clause of the Federal Constitution against placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied on the aggregate, as is the franchise tax, rather than on individual transactions.[1] However, the exploitation of foreign corporations of intrastate opportunities under the protection and encouragement of local governments offers a basis for taxation as unrestricted as that for domestic corporations, the Commerce Clause of the United States Constitution not prohibiting states from requiring an activity connected to interstate commerce to contribute to the general cost of providing governmental services.[2]

A corporate excise tax scheme does not impose a disproportionate burden on foreign corporations, and thereby discriminate against interstate commerce in violation of the Dormant Commerce Clause, in light of an exclusion available for foreign corporations having only de minimus contact with the state.[3] A franchise tax, as applied to a foreign corporation employing representatives in a state, whose primary functions are to drum up business, is constitutional because such activities constitute a sufficient nexus between the foreign corporation and the State to justify the exercise of the taxing power.[4]

A State does not exceed the constitutional range of its taxing power in measuring a retailer's occupation tax upon a foreign corporation operating a branch office and warehouse in the state by the entire gross income of the corporation from sales to inhabitants of the state in which the branch office participated either by receiving the order or distributing the goods, even though the orders were accepted at and filled by shipments from the home office, where the corporation has not established that such services as were rendered by the branch office were not decisive factors in establishing and holding the local market.[5] Statutes imposing excise taxes measured by income or receipts have been sustained when applied to express[6] or pipeline companies engaged in interstate commerce.[7] On the other hand, the view has been expressed that the Commerce Clause prevents a state from imposing an excise tax on foreign corporations not apportioned to intrastate activities but measured by the taxpayer's entire gross receipts, including those derived from interstate business.[8]

Footnotes

1 Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 104 S. Ct. 1856, 80 L. Ed. 2d 388 (1984).

2 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981).

3 Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 701 N.E.2d 961 (1998).
As to discrimination, generally, see § 201.

4 Clairol Inc. v. Com., 513 Pa. 74, 518 A.2d 1165 (1986).

5 Norton Co. v. Department of Revenue of State of Ill., 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951).

6 Railway Exp. Agency, Inc. v. Com. of Va., 358 U.S. 434, 79 S. Ct. 411, 3 L. Ed. 2d 450 (1959).

7 Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942).

8 United Gas Pipe Line Co. v. Lee, 154 Fla. 235, 17 So. 2d 553, 154 A.L.R. 617 (1944); Commissioner of Corporations and Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936 (1941).

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B. Impact of Commerce Clause

1. Excise, Privilege, and Franchise Taxes

§ 195. Measure and amount—Measured by capital stock

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

In a number of cases, excise, franchise, or privilege taxes on foreign corporations, measured in some manner by capital stock and, in most instances, providing for an apportionment, in computing the amount, according to property or capital employed in the taxing state, or the business done or receipts earned there, have been upheld as against the objection that they violated the Commerce Clause of the Federal Constitution.[1] In other instances, taxes of the kind in question, usually measured according to the entire capital stock of the taxpayer, have been held invalid as an infringement upon the Commerce Clause.[2]

Footnotes

1 Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304 (1939); Judson Freight Forwarding Co. v. Com., 242 Mass. 47, 136 N.E. 375, 27 A.L.R. 1131 (1922).

2 Atlantic Refining Co. v. Commonwealth of Virginia, 302 U.S. 22, 58 S. Ct. 75, 82 L. Ed. 24 (1937).
A franchise tax a state assessed against foreign corporations violated the Commerce Clause; the franchise tax scheme imposed a higher tax burden on foreign as opposed to domestic corporations, in that it allowed domestic corporations to reduce their franchise tax liability simply by reducing the par value of their stock, and the foreign franchise tax was not a complementary tax that offset the tax burden that the domestic shares tax imposed upon domestic corporations since the relevant tax burdens were not approximate or similar in substance. South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 119 S. Ct. 1180, 143 L. Ed. 2d 258 (1999).

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B. Impact of Commerce Clause

1. Excise, Privilege, and Franchise Taxes

§ 196. Measure and amount—Measured by property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

A franchise tax is purely a tax on the right and privilege to conduct business within a state, and thus, a foreign corporation is not necessarily exempt from a franchise tax merely because it possesses no tangible property within the state.[1] Franchise taxes need not be based solely on the amount of property owned within the state so long as they bear some real and reasonable relation to the privilege granted or to the protection of the interests of the state.[2]

Footnotes

1 Clairol Inc. v. Com., 513 Pa. 74, 518 A.2d 1165 (1986).

2 Armour & Co. v. Kosydar, 46 Ohio St. 2d 450, 75 Ohio Op. 2d 502, 349 N.E.2d 301 (1976).

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B. Impact of Commerce Clause

2. Nature of Corporation and its Business

§ 197. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

A taxing state must have a substantial interest in the relevant transactions in order to justify the imposition of a tax on a foreign corporation that conducts its business by mail from outside the taxing state, such interest being measured by the extent and nature of contact between the state and the foreign corporation and the benefits conferred on the corporation by the state.[1]

With respect to foreign corporations specifically, it has been held that sales of automobiles by a manufacturing branch of a motor company for delivery either by freight shipment or caravan to dealer-customers outside the state constitute transactions in interstate commerce.[2] On the other hand, sales by a branch of a foreign manufacturing concern to dealer-customers residing or doing business within the state where such branch is located have been held to constitute transactions in intrastate commerce.[3]

A foreign carrier has sufficient connection to a state for a corporate excise tax assessment to satisfy the nexus requirement of the dormant Commerce Clause analysis where the carrier's trucks made numerous trips to and within the state.[4]

Footnotes

1 Illinois Commercial Men's Assn. v. State Bd. of Equalization, 34 Cal. 3d 839, 196 Cal. Rptr. 198, 671 P.2d 349 (1983).

2 Commissioner of Corporations and Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936

(1941).

3 Commissioner of Corporations and Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936 (1941).

4 Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 701 N.E.2d 961 (1998).

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B. Impact of Commerce Clause

2. Nature of Corporation and its Business

§ 198. Corporations engaged exclusively in either interstate or intrastate commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

In general, it may be said that the imposition by a state of a license, franchise, or privilege tax upon foreign corporations engaged exclusively in interstate commerce is violative of the Commerce Clause[1] while the imposition of such a tax upon a foreign corporation not engaged within the state in any interstate or foreign commerce whatever is not.[2]

Footnotes

1 Commissioner of Corporations and Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936 (1941).

2 Cheney Bros. Co. v. Commonwealth of Massachusetts, 246 U.S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (1918).

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B. Impact of Commerce Clause

2. Nature of Corporation and its Business

§ 199. Corporations engaged in both interstate and intrastate commerce

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

The broad principle that a foreign corporation engaged in both interstate and intrastate commerce in a state may be required by the State to pay an excise or franchise tax for the privilege of doing intrastate business therein in a corporate capacity is well established.[1] In addition, it has been stated that while a concern does not, by engaging in business within a state, lose its right to do interstate business with tax immunity, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.[2]

Footnotes

[1] Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942); Commissioner of Corporations and Taxation v. Ford Motor Co., 308 Mass. 558, 33 N.E.2d 318, 139 A.L.R. 936 (1941).

[2] Norton Co. v. Department of Revenue of State of Ill., 340 U.S. 534, 71 S. Ct. 377, 95 L. Ed. 517 (1951).

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XIII. Foreign Corporations

B. Impact of Commerce Clause

2. Nature of Corporation and its Business

§ 200. Corporations engaged in both interstate and intrastate commerce—Tax based on local business, property, or capital

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2254 to 2259, 2562, 2563

State excise or privilege taxes upon foreign corporations engaged in both interstate and intrastate commerce are valid, as against objections based on the Commerce Clause, where the taxes are based upon or measured by the taxpayer's local or intrastate business, income, property, or capital only,[1] or where the measure employed in determining the amount of the tax excludes income, capital, business, and property used in or derived from interstate commerce, assuming that a reasonably accurate method of apportioning the tax to the amount of the taxpayer's intrastate business is provided.[2] The Commerce Clause of the Federal Constitution allows states to tax the income of foreign corporations doing business within its borders[3] provided that the levy is not discriminatory and is properly apportioned to local activities.[4] A franchise tax measured on the entire net income of a foreign corporation reasonably attributable to the state is not inherently arbitrary, and its application produces no unreasonable results, nor does such a tax impose a burden on interstate commerce.[5]

The Equal Protection Clause is violated by a portion of a state statute which requires foreign corporations to pay an additional domestication tax or fee on the proportion of stated capital and surplus represented by an increase in property and business in a state where the state corporations are not subject to such a tax or fee increase.[6]

Footnotes

1 Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942).

2 Pacific Telephone & Telegraph Co. v. Tax Commission of State of Washington, 297 U.S. 403, 56 S. Ct. 522, 80 L. Ed.

760, 105 A.L.R. 1 (1936).

3 Phillips Petroleum Co. v. Iowa Dept. of Revenue and Finance, 511 N.W.2d 608 (Iowa 1993), as amended on denial of reh'g, (Feb. 17, 1994).

4 General Motors Corp. v. State, 181 Colo. 360, 509 P.2d 1260 (1973).
As to discrimination, generally, see § 201.

5 Wurlitzer Co. v. State Tax Commission, 35 N.Y.2d 100, 358 N.Y.S.2d 762, 315 N.E.2d 805 (1974).

6 Missouri Pacific R. Co. v. Kirkpatrick, 652 S.W.2d 128 (Mo. 1983).

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C. Equality and Uniformity; Discrimination

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Research References

West's Key Number Digest

West's Key Number Digest, Taxation 2124, 2125, 2137

A.L.R. Library

A.L.R. Index, Excise Taxes
A.L.R. Index, Income Tax
A.L.R. Index, Personal Property Tax
A.L.R. Index, Taxes
A.L.R. Index, Taxpayers
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C. Equality and Uniformity; Discrimination

§ 201. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2124, 2125, 2137

Whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify the imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.[1]

A state law imposing a higher premiums tax on foreign insurance companies than on domestic insurance companies, and allowing foreign companies to reduce but not eliminate the disparity in tax rates by investing certain proportions of their assets in state assets and securities, cannot be justified under the Equal Protection Clause by its asserted purpose of promoting domestic business within the state, which is not a legitimate state purpose for purposes of the Equal Protection Clause where it is accomplished by discriminating against foreign corporations that wish to compete by doing business in the state, or by its asserted purpose of encouraging investment in state assets, which is also not a legitimate state purpose when furthered by discrimination.[2] Also, a state ad valorem tax against certain intangible property, such as notes and accounts receivable, owned by foreign corporations and owing from out-of-state debtors, which at the same time exempts identical property owned by residents and domestic corporations, is invalid as violating the Equal Protection Clause of the 14th Amendment; and equality is not restored by the fact that the exempted intangibles of residents are offered up to the taxing power of other states.[3]

Footnotes

1 Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

2 Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985).

[3] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544, 55 Ohio L. Abs. 305 (1949).

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C. Equality and Uniformity; Discrimination

§ 202. Effect of previous admission to do business in state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2124, 2125, 2137

After a state has chosen to domesticate a foreign corporation, it is entitled to equal protection with the state's own progeny, at least to the extent that its property is entitled to an equally favorable ad valorem tax basis.[1]

A state tax on the business of a foreign corporation, after its admission into the state for the purpose of conducting business, may not be imposed in the guise of an admission fee without violating the Equal Protection Clause of the 14th Amendment.[2]

Footnotes

1 Wheeling Steel Corp. v. Glander, 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544, 55 Ohio L. Abs. 305 (1949).

2 Western and Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981).

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Research References

West's Key Number Digest

West's Key Number Digest, Taxation 2008, 2068, 2543, 2562

A.L.R. Library

A.L.R. Index, Excise Taxes
A.L.R. Index, Income Tax
A.L.R. Index, Personal Property Tax
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§ 203. Property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2008, 2068, 2562

A State has the power to impose upon foreign corporations a tax upon their real estate[1] and tangible personal property located within its borders, when such corporation is doing business within the state.[2] A board of public works has jurisdiction to assess and collect ad valorem taxes from a foreign public service corporation that owns property situated within the state but does not operate as a public utility in the state.[3]

Taxation by the State in which intangibles of a foreign corporation have acquired a business situs has been repeatedly upheld.[4]

Footnotes

1 Savings & Loan Soc. v. Multnomah County, 169 U.S. 421, 18 S. Ct. 392, 42 L. Ed. 803 (1898).

2 Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 58 S. Ct. 436, 82 L. Ed. 673 (1938); Flying Tiger Line Inc. v. Board of Assessors of Boston, 404 Mass. 359, 535 N.E.2d 231 (1989); Hamilton & Gleason Co. v. Emery County, 75 Utah 406, 285 P. 1006 (1930).
As to what constitutes doing business within a state, see § 190.

3 Columbia Gas of Maryland, Inc. v. Board of Public Works of State of W.Va., 194 W. Va. 75, 459 S.E.2d 352 (1995).

4 Suttles v. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 21 S.E.2d 695, 143 A.L.R. 343 (1942).

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§ 204. Privileges and franchises

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2008, 2068, 2562

A State has the power to impose a privilege tax on a foreign corporation within its jurisdiction; the fact that it is not a domiciliary of the taxing state is of little consequence.[1] A franchise, license, or privilege tax purportedly imposed upon the right of a foreign corporation to do business within the state is not invalid where it is imposed upon or measured by only the business of the taxpayer transacted within the state by means of some reasonable formula for apportioning the exaction to such business.[2] A state's privilege tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in their relation to the interstate privilege.[3]

A state tax law imposes a franchise tax on each corporation doing business in the state, measured by its entire net income which, for purposes of the statute governing the tax, is determined by taking the taxpayer's federal taxable income and apportioning it among the states within which the corporation is doing business.[4] A foreign corporation's income from investment securities that was not used for operations did not have a sufficient nexus with the state to be subject to the state franchise tax; although the corporation did business in the state, it did not use the securities to secure loans of working capital and did not need funds to operate its business.[5]

For purposes of a franchise tax, which is an annual tax based on the value of a foreign corporation's capital stock, foreign corporations involved in distinct business activities may exclude from the valuation of its capital stock those portions of business which are conducted entirely outside of the state and are entirely unrelated to business conducted within the state.[6]

A foreign corporation's gains from the sale of depreciable real and tangible personal property neither located in nor having a taxable situs in state are not apportionable income subject to the state franchise tax.[7]

The amendatory language of a state constitutional provision governing foreign corporations doing business in the state, which restricts a franchise-tax levy on foreign corporations to the value of a foreign corporation's property within the state, serves as a limitation only on the authority to tax foreign corporations; it does not reflect a conscious choice on the framers' part to

require a franchise tax based on the value of the property of domestic corporations both within and without the state.[8]

Footnotes

1 Matter of Grayco Land Escrow, Ltd., 57 Haw. 436, 559 P.2d 264 (1977).

2 Butler Bros. v. McColgan, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942); Mississippi State Tax Commission v. Tennessee Gas Transmission Co., 239 Miss. 191, 116 So. 2d 550 (1959).

3 International Harvester Co. v. Evatt, 329 U.S. 416, 67 S. Ct. 444, 91 L. Ed. 390 (1947).

4 Kellogg Co. v. Herrington, 216 Neb. 138, 343 N.W.2d 326 (1984).

5 American Home Products Corp. v. Limbach, 49 Ohio St. 3d 158, 551 N.E.2d 201 (1990).

6 Com. v. After Six, Inc., 489 Pa. 69, 413 A.2d 1017 (1980).

7 Borden, Inc. v. Limbach, 49 Ohio St. 3d 240, 551 N.E.2d 1268 (1990).

8 Opinion of the Justices, 756 So. 2d 21 (Ala. 1999).

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§ 205. Validity of formula of apportionment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Taxation 2008, 2068, 2543, 2562

A state tax on corporations doing business within a state is not limited to transactions within that state so long as the tax is fairly apportioned,[1] and if the statute imposes a formula that is inherently arbitrary, it is invalid.[2]

A state's apportionment formula of income for tax purposes need not allocate income with precision to satisfy the due process clause but must only be fair.[3] A court is required to strike down an apportionment formula under the due process clause only when a taxpayer has established by clear and cogent evidence that the apportioned income is out of all appropriate proportion to the business the taxpayer transacts in the state, but a court is not required to disturb an apportionment formula if the state, in applying the formula to a unitary business taxpayer's total income, obtains a rough approximation of the corporate income that is reasonably related to activities conducted within the taxing state.[4]

A State using the formula apportionment method of taxing multi-state corporations need not show a specific connection with any particular income-generating activity, as the link is supplied by a State's connection to the unitary business operations as a whole, and thus, the State may tax its proportionate share of the taxpayer's entire income.[5] Under the formula apportionment method of taxing multi-state corporations, the receipts, property, and income of a "unitary business," both in-state and out-of-state, are included in the tax base and then multiplied by a state's apportionment formula to determine what portion of the tax base the State may tax.[6] In other words, this method calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction.[7]

To be entitled to the allocation of income attributable to sources outside the state for the purposes of determining an unincorporated business tax, there must be evidence that the unincorporated business has a regular place of business in another state or states and that the place of business outside the state is systematically and regularly used by the entity in carrying on its business.[8]

An unapportioned tax measured by the total sales of a foreign corporation within a state may be valid even though the major functions which contributed to the value of the taxed product, such as its manufacture, occur outside the taxing state.[9]

CUMULATIVE SUPPLEMENT

Cases:

While the Due Process Clause and the Commerce Clause imposes no single apportionment formula on the States, apportionment must produce at least a rough approximation of the corporate income that is reasonably related to the activities conducted within the taxing state; however, if a taxpayer seeks to challenge the appropriateness of an apportionment formula on this basis, it is incumbent upon the taxpayer to show by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 14. First Marblehead Corp. v. Commissioner of Revenue, 470 Mass. 497, 23 N.E.3d 892 (2015).

[END OF SUPPLEMENT]

Footnotes

1 Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation, 100 N.J. 1, 494 A.2d 775 (1985).

2 General Motors Corp. v. District of Columbia, 380 U.S. 553, 85 S. Ct. 1156, 14 L. Ed. 2d 68 (1965).

3 Gillette Co. v. Commissioner of Revenue, 425 Mass. 670, 683 N.E.2d 270 (1997).

4 Gillette Co. v. Commissioner of Revenue, 425 Mass. 670, 683 N.E.2d 270 (1997).

5 Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

6 Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

7 Whirlpool Properties, Inc. v. Director, Div. of Taxation, 208 N.J. 141, 26 A.3d 446 (2011).

8 McMahan v. State Tax Commission, 45 A.D.2d 624, 360 N.Y.S.2d 495 (3d Dep't 1974).

9 Illinois Commercial Men's Assn. v. State Bd. of Equalization, 34 Cal. 3d 839, 196 Cal. Rptr. 198, 671 P.2d 349 (1983).

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§ 206. Validity of formula of apportionment—Inclusion and exclusion of intangibles

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West's Key Number Digest

West's Key Number Digest, Taxation 2008, 2068, 2562

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Inclusion of investments in stock of other corporations in fixing base for taxation of corporation, 11 A.L.R.2d 323

A foreign corporation doing business within a state and paying a franchise tax is not entitled to a deduction for the investment in the stock of a domestic corporation which had paid a capital stock tax in determining the taxable value of its property for purposes of the franchise tax.[1]

Where stock owned by a foreign corporation is unrelated to the corporation's real estate investments and a real estate business carried on by the corporation in state, the State could not include the value of the stock in computing the franchise tax to be levied on the corporation.[2]

Footnotes

1 Com. v. Eaglis Corp., 354 Pa. 493, 47 A.2d 661 (1946).

2 Com. v. Carheart Corp., 450 Pa. 192, 299 A.2d 628 (1973).

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